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RAILROAD REPORTS

(Vol. 59 American and English Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND, DECIDED BY THE COURTS OF LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XXXVI.

THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.
1910.

96882

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RAILROAD REPORTS

LOUISVILLE & N. R. CO. *v.* HUGHES.

(Supreme Court of Georgia, Feb. 19, 1910.)

[67 S. E. Rep. 542.]

Corporations—Transfer of Property—Effect.*—Where one corporation conveys its property to another, this alone does not destroy the corporate existence of the grantor, or constitute a merger of the two corporations, or render the grantee subject to an action for damages for a tort previously committed by the grantor. The grantor is still subject to suit; and if liable, the question of seeking to subject property to such liability on a judgment rendered thereon is different from suing the grantee directly for the tort.

(a) The deed from the A., K. & N. R. Co. to the L. & N. R. Co. was a conveyance of property, not a merger of corporate existence.

Corporations—Transfer of Property—Liability for Tort of Transferror.*—The fact that the grantee agreed with the grantor to pay all of the debts or liabilities of the latter, existing at the time of the transfer, did not authorize one who claimed to have been injured by a tort of the grantor, committed before the making of the transfer, to bring suit therefor against the grantee.

Corporations—Transfer of Property—Torts of Grantee—Liability.*—If the grantee was guilty of any tort or violation of duty after the conveyance, causing injury, it would be liable for such damages as were shown to be caused by its breach of duty or tortious conduct, but not because of its agreement with the grantor on the theory of merger.

Master and Servant—Torts of Servant—Liability of Master.†—The employer generally is not responsible for torts committed by his employee, when the latter exercises an independent business and is not subject to the immediate direction and control of the employer. Civ. Code 1895, § 3818.

Master and Servant—Independent Contractors.†—As a general rule a railroad company is not liable for an injury resulting from a nuisance

*For the authorities in this series on the question whether the purchaser of railroad property can be held liable on account of claims against the predecessor railroad company, see foot-note of Hukle *v.* Atchison, etc., Ry. Co. (Kan.), 17 R. R. R. 692, 40 Am. & Eng. R. Cas., N. S., 692, where all those preceding it are collected; sixth head-note of Denver, etc., Ry. Co. *v.* Hannegan (Colo.), 31 R. R. R. 112, 54 Am. & Eng. R. Cas., N. S., 112.

†See first foot-note of Thomas *v.* Wisconsin Cent. R. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

created by the negligence of an independent contractor in constructing its railroad, where it retains no control over the contractor, except to see, by its superintendent, that the railroad is built according to contract. Atlanta & Florida R. Co. *v.* Kimberly, 87 Ga. 161 (1), 13 S. E. 277, 27 Am. St. Rep. 231.

(a) The contract in the present case contained the following, among other, provisions: "Said labor, teams, tools, engines, machinery, and materials to be furnished and the said work to be done by said contractors to the satisfaction of the engineer of the railroad company, according to said specifications, plans, profiles, and sections, and according to such working plans and explanatory drawings and instructions as may from time to time be furnished by said engineer." The "contractors will give personal attention and superintendence to the work." The "amount of force employed by the contractors is at all times subject to regulation, and must be increased or diminished as required by the engineer." The "work under this contract shall at every stage of its progress—from beginning to end—be subject to the direction, inspection, and acceptance of the engineer, who shall determine what in any case is a fair construction of the contract, and what such construction requires to be done by either party; and his final measurements and classifications shall be final and conclusive upon both parties." The engineer shall have power to direct the application of the forces to any portion of the work which, in his judgment, requires it, and to order the increase or diminution of the forces at any point he may indicate." "The contractors [shall not] employ any person or persons who commit depredations on the neighborhood, or insult travelers or other persons; and all such disorderly persons shall be discharged from employment whenever the contractors shall be directed so to do by the engineer in charge of the work." Held, that in its general scope the contract made the parties who contracted to do the work specified for the railroad company independent contractors. Considering the character of the work to be done, the necessity for inspecting it and seeing that it came up to contract specifications, and the entire contract, the above-quoted provisions, inserted for the purpose of having the engineer see that the work came up to the requirements of the contract, of guarding against disorderly conduct affecting the public, and for requiring the contractors to hasten the work at particular points where necessary for the fulfillment of the contract, did not make the contractors the mere servants of the railroad company, so as to ipso facto render the latter liable for the negligence of the former in the mere manner of performing the work, if the company was not otherwise liable for the conduct of such parties, considered as independent contractors, in causing the injury.

Master and Servant—Negligence of Servant—Liability of Master.† —The employer is liable for the negligence of the contractor: (1) When the work is wrongful in itself, or, if done in the ordinary man-

†See (†) on preceding page.

ner, would result in a nuisance; (2) or if, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed; (3) or if the wrongful act is the violation of a duty imposed by express contract upon the employer; (4) or if the employer retains the right to direct or control the time and manner of executing the work, or interferes and assumes control, so as to create the relation of master and servant, or so that injury results which is traceable to his interference; (5) or if the employer ratifies the unauthorized wrong of the independent contractor. Civ. Code 1895, § 3819.

Inaccurate Instructions.—The entire charge not in the record. In certain excerpts from the charge in relation to the measure of damages, in case of liability, the law on the subject appears to be inaccurately stated; but, as the case is returned for another trial, they need not now be dealt with more in detail.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by D. W. Hughes against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Tye, Peeples & Jordan, D. W. Blair, and *Neel & Peeples,* for plaintiff in error.

J. G. B. Erwin, Jr., and *Thos. W. Milner & Son,* for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* MOSELEY.

(Supreme Court of Alabama, Jan. 11, 1910.)

[51 So. Rep. 424.]

Master and Servant—"Fellow Servants"—Who Are.*—A motorman on one car of a street railroad is a "fellow servant" of a conductor on another car of the same railroad operating cars over the same lines, as both work for the same master over the same lines and for the same purpose.

Master and Servant—Injuries to Servant—Liability—Statutes.—Code 1896, § 1749, subd. 5, making a master liable for injury received by a servant caused by the negligence of any servant in charge of any train on a railway, etc., applies to electric street railways.

Master and Servant—Death of Servant—Actions—Complaint.—A complaint, in an action for the death of a motorman in a collision, which alleges that the car operated by the motorman ran into a car standing on the track, and that the collision was caused by the negligence of the conductor in control of the latter car, sufficiently alleges the negligence of the conductor, for there is no presumption that the administrator has knowledge of the duties of the conductor which were violated and which caused the accident.

Pleading—Complaint—Sufficiency.—In pleading matters which are in their nature more within the knowledge of defendant than plaintiff, less particularity is required in the complaint than in other cases.

Pleading—Allegations under a Videlicet or Scilicet.—The general rule as to allegations under a videlicet or scilicet is that if they be impossible, or repugnant to the preceding matter, they must be rejected as surplusage; but where they are used to explain what goes before them, and are consistent with the preceding matter, they are material and traversable.

Master and Servant—Death of Servant—Complaint—Sufficiency.—A complaint, in an action for the death of a motorman in a collision, which alleges that the death was caused by the negligence of some person whose name is unknown to plaintiff, and who had charge of a car on a track, and that the negligence consisted in this, "to wit," said person negligently failed to protect the car with any light or signal, and "that said person is one, to wit, C.," who was the conductor of the car, etc., is sufficient as against a demurrer that it is vague and indefinite, for the first "to wit" refers to all that succeeds it, while the second "to wit" refers only to the name C., and no statement under the first is repugnant to what precedes it, and if the words

*For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see last foot-note of Louisville & N. R. Co. *v.* Clark (Ky.), 29 R. R. R. 595, 52 Am. & Eng. R. Cas., N. S., 595; fourth foot-note of Indianapolis, etc., Co. *v.* Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

"that said person is one, to wit, C.," is repugnant, it must be treated as surplusage.

Master and Servant—Regulations—Municipal Ordinances—Effect.—An ordinance regulating the speed of cars is for the protection of the public, and not for the benefit of employees operating cars.

Pleading—Construction.—A pleading must be construed most strongly against the pleader.

Master and Servant—Rules of Employment—Effect.—Where there is a general rule regulating the conduct of servants which applies under ordinary conditions, and there is a special rule which applies under extraordinary conditions, the special rule supersedes the general rule when the extraordinary conditions exist, and a violation of the special rule under extraordinary conditions is not excused by an observance of the general rule.

Master and Servant—Rules of Employment—Effect.—A street railway may not make a schedule for the car of a motorman, and also make a rule which makes the schedule impossible under usual and ordinary conditions, and then hold the motorman negligent in doing that which is necessary to make the schedule.

Death—Action for Negligent Death—Evidence—Admissibility.—In an action by an administrator for the negligent death of his intestate, leaving a mother and a younger brother, evidence of the financial and physical condition of the mother and younger brother is admissible; it being permissible to show that the intestate had persons who would have been distributees, had he left an estate, dependent on him for support, and the amount he contributed to their support.

Appeal and Error—Questions Reviewable—Questions Not Raised in Lower Court.—An objection to questions asked a witness and the answers thereto, not raised in the trial court, will not be considered on appeal.

Master and Servant—Death of Servant — Actions — Evidence.—Where, in an action for the negligent death of a motorman, some of the rules of the railroad were pleaded, the court properly allowed the reading to the jury that part of the railroad's rule book which was in a sense the inducement to every rule in the book and therefore part of the same.

Witnesses—Examination—Discretion of Court.—The allowance of a witness to be recalled for further examination before the examination of witnesses has closed is within the discretion of the trial court and will not be disturbed unless abused.

Trial—Issues—Evidence—Instructions.—A requested charge supported only by evidence properly ruled out is properly refused.

Death—Action for Negligent Death—Contributory Negligence.—Unless the negligence of decedent proximately contributed to his death, his negligence did not bar a recovery for his death.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Birmingham Ry., L. & P. Co. *v.* Moseley

Action by Charles A. Moseley, administrator of Charles S. Moseley, deceased, against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

All the counts of the complaint were stricken, except the fifth and seventh. The seventh count is sufficiently set out in the opinion. The fifth count was as follows: "Plaintiff, Charles A. Moseley, as administrator of the estate of Thomas S. Moseley, deceased, claims of the defendant, Birmingham Railway, Light & Power Company, a corporation, $30,000 as damages, for that heretofore, on, to wit, the 29th day of December, 1906, defendant was a common carrier of passengers for hire by means of street railway cars propelled by electricity in Jefferson county, Alabama, and on said date plaintiff's intestate, Thomas S. Moseley, was in the employment of defendant as a motorman upon one of its said street railway cars, and while on said car and in the service and employment of defendant, and engaged in and about his duties as such employee, said car collided with great force and violence with another one of defendant's cars which had been stopped and was standing on the street railway track of defendant, and plaintiff's said intestate was thereby so injured that he died, to plaintiff's damage in the sum aforesaid. Plaintiff avers that his said intestate's death was caused by reason of and as a proximate consequence of the negligence of the conductor, to wit, one Cornelius, whose name is otherwise unknown to plaintiff, in the service and employment of defendant, and who then and there had charge or control of the car upon the track of defendant's said railway, with which the car upon which plaintiff's intestate was collided." The demurrers sufficiently. appear from the opinion.

The assignments of error referred to in the opinion are as follows: "(15) The court erred in overruling appellant's objection to the following question propounded by appellee to witness James Moseley. (16) Her answer thereto that he was afflicted. (17) In overruling appellant's objection to the following question propounded by the appellee to the same witness: 'Now, I will ask you to tell the jury whether or not that boy was afflicted.' (18) Answer of witness to last-named question. (19) Overruling question propounded by appellee to same witness: 'I will ask you whether or not this other boy of yours contributed to your support.' (20) Answer to that question. (21) Question propounded by appellee to the same witness: 'Then I will ask you to tell the jury how your other boy was afflicted—what was his physical condition?' (22) The answer: 'He was afflicted in his head. He has a dead bone in his head and catarrh, which he has had all of his life.' (23) Question propounded by appellee to the same witness: 'I will ask you whether or not he was able to work and earn money?' (24) And the answer to that question. (25) Ques-

tion propounded by appellee to same witness: 'I will ask you to tell the jury whether or not you have any means of support, other than what you receive from him.' (26) 'The answer thereto: 'I was entirely dependent upon him.'" "(32) Question propounded by appellee to witness McCary: 'At a greater speed than usual?' (33) And the answer thereto: 'No, sir; I don't think we were going any faster than we should go.' (34) The court below erred in overruling appellant's motion to exclude what was inscribed on the first page of appellant's rule book. (35) Sustaining appellee's objection to the following question propounded by appellant to the witness Jones: 'Did, or not, the signal you gave to Mr. Moseley indicate what was ahead of him?' (36) Sustaining objection to question propounded by appellant to same witness: 'Mr. Jones, I will ask you to tell the jury whether or not the signal which you gave Mr. Moseley meant for him to stop the car, for the reason that there was danger ahead of him.' (37) Sustaining appellee's objection to the following question propounded by appellant to the same witness: 'What did the signal that you gave Mr. Moseley indicate to him as to the stopping of his car?' (38) Sustaining objection to appellant's question to same witness: 'Tell the jury whether or not you did everything in your power to get him to stop the car.'"

The following charges were refused to the defendant: Charge 1 is set out in the opinion. (5) "If the jury believe from the evidence in this case that Moseley, the deceased, was warned or signaled to stop the car, and thereafter negligently failed to do so, and that his negligence in this regard proximatey contributed to his death, you must find a verdict in favor of the defendant."

Charge 1 given at plaintiff's request is as follows: "Even though you should believe from all the evidence that Moseley, the intestate, negligently ran the car at a high rate of speed, yet, unless you further believe from the evidence that such negligence proximately contributed to his death, then such negligence would not bar plaintiff's right to recover."

Tillman, Grubb, Bradley & Morrow, for appellant.
Stallings & Drennen, for appellee.

EVANS, J. This suit was brought by the appellee, Chas. A. Moseley, as the administrator of the estate of Thomas S. Moseley, deceased, against appellant, Birmingham Railway, Light & Power Company, a corporation. Plaintiff claimed damages for the alleged negligence of one of appellant's servants, to wit, one Cornelius, a conductor on appellant's street railway, while in discharge of his duties as such conductor, which proximately caused the death of plaintiff's intestate. There were many counts to the complaint, but all of them were eliminated by the action of the

lower court, except counts 5 and 7, both of which counted upon the negligence of the conductor of the car into which plaintiff's intestate's car, upon which he was motorman, was run.

The defendant below, appellant here, insists upon questions raised by his demurrer to counts 5 and 7: (1) That said counts show that plaintiff's intestate, who was a motorman on one of defendant's street railway cars, and the said conductor who had charge of the car on defendant's said street railway, into which the car upon which plaintiff's intestate was, was run, were fellow servants; and (2) that subdivision 5 of section 1749 of the Code of 1896 does not apply to street railways operated by electricity, but only to railroads operated by steam, which traverse the country at large, and which are more dangerous to operate than the cars upon an electric street railway.

We think there can be but little doubt that a proper construction of law would declare a motorman upon one car of a street railway to be a fellow servant of a conductor upon another car of the same railway operating cars over the same lines. Any other construction would be too narrow. Both working for the same master, over the same line of railway, and for the same purpose, to wit, transporting passengers from one point to another along such line of railway, we declare to be fellow servants. But we think that to declare that the fifth subdivision of section 1749 of the Code of 1896 only applied to railroads operated by steam locomotives, which traverse the country at large, would also be too narrow a construction. It may be true that, as counsel for appellant ably contend, there were no railways operated by electricity at the time this statute was first passed by the Legislature; and it may also be true that the hazard and danger of operating steam locomotives, with heavy trains, which traverse the country at large, is much greater than that of operating the light cars propelled by electricity upon a street railway. But many of the dangers of the former differ from those of the latter in degree rather than character. In operating railways, whether by steam or electricity, which involves more or less hazard to employees as well as passengers, and where most duties are performed out of sight or immediate superintendence of the master, the law must needs not only make the master careful as to the kind of servants he employs, but must hold the master responsible, under many circumstances, or conditions, for the acts of such servant or employee, not only for the safety of the public, but for the safety of other servants and employees. Whether the motive power be steam or electricity, or whether operated through the country or through the streets of a city, whether heavy trains or light cars are used, they are both railways, and similar dangers are encountered in each; and the negligence of an impecunious servant might become a menace to the life and limb of other servants, as well as to passengers, for which there would be no ade-

quate redress. It would seem also that the Legislature has placed such construction upon subdivision 5 of section 1749 of the Code of 1896, because in subdivision 5 of section 3910 of the Code of 1907 the words "electric motor" are inserted without changing any other word in said subdivision. We are not aware that any of the railroads now transporting passengers and freight acoss the different parts of the state use electric motors; while practically all, if not all, of the street railways in the state use them exclusively to run their cars. When this law (section 1749 of the Code of 1896) was first passed, it is evident that the Legislature did not then anticipate the running of cars by an electric motor, inasmuch as it made no provision for damages resulting from the negligence of the person in charge of an "electric motor." It would seem also true that the Legislature considered that street railways fall into the general purview of the statute, and under the general designation of "railway" in said statute, inasmuch as they have added the words "electric motor" without changing any other words of the statute. There is furthermore nothing in the substance or terms of this statute which would make it inapplicable to street railways. It has been held that other statutes regarding railroads were applicable to street railways in so far as they were consistent with the genius of street railways, and beneficial in their character; although other provisions of the law might have no field of operation when applied to street railways. Birmingham So. R. R. *v.* Powell, 136 Ala. 232, 33 South. 875; Ensley Ry. Co. *v.* Chewning, 93 Ala. 24, 9 South. 458; L. & N. R. R. Co. *v.* Anchors, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116.

The averments of negligence in counts 5 and 7 are, according to the former rulings of this court, sufficient. A. G. S. R. R. Co. *v.* Davis, 119 Ala. 572, 24 South. 862. It would seem from the standpoint of reason that if plaintiff's intestate were living, and suing for injuries received, greater particularity in the averments of negligence should be required for the reason that one would naturally presume that the motorman would be acquainted with those duties of the conductor which had been violated, and which caused his injuries; but where the motorman is killed, and his administrator sues, no such presumptions arise, and the same reasons which permit statements of mere conclusions, as to negligence, where a passenger sues for injuries received while riding on a car or train, are equally cogent here. As said in L. & N. R. R. Co. *v.* Jones, 83 Ala. 376, 3 South. 902, first headnote: "It is a general rule of pleading that in stating or averring matters which are, in their nature, more within the knowledge of defendant than of the plaintiff, less particularity is required than in other cases," etc. For reasons above given and the authorities cited, we hold that counts 5 and 7 were sufficient so far as the allegations of negligence were concerned.

But there is another ground of demurrer to count 7 which is urged by appellant, viz., "that said count is vague and indefinite." Said count, in respect to the acts of negligence, after amendment, reads as follows: "Plaintiff avers that his intestate's death was caused, and plaintiff suffered said damages, by reason and as a proximate consequence of the negligence of some person whose name is to the plaintiff unknown, and who then and there had the charge or control of a car upon a track of defendant's railway and that said negligence consisted in this, to wit, said person negligently failed to protect said car with any light or signal by which plaintiff's said intestate should have and could have been warned, and plaintiff avers that said person is one, to wit, Cornelius, and that he was the conductor of the car into which was run the car upon which was plaintiff's intestate." As said in Gleason *v.* McVickar, 7 Cow. (N. Y.) 42, 43: "The general rule in relation to allegations under a videlicet, or scilicet, seems to be that if they be impossible, or contrary, or repugnant to the preceding matter, they shall be rejected as surplusage; but where they are used to explain what goes before them, and are consistent with the preceding matter, they are material and traversable." In Brown *v.* Berry, 47 Ill. 175, 177, we find the following: "The use of the videlicet is to avoid a variance and to avoid a positive averment which must be strictly proved." Under these authorities, which define the use of the videlicet, as far as the case at bar demands, we hold that said count 7 is not subject to the ground of demurrer last stated. The first "to wit" refers to all that succeed it; whereas, the second "to wit" refers only to the name "Cornelius." No other statement under the first videlicet is repugnant to what precedes it, and if the words "that said person is one, to wit, Cornelius," are repugnant, they should be treated as surplusage; but we consider it rather in the light of the second rule laid down in the case of Brown *v.* Berry, *supra*, that it was so stated to avoid a positive averment of the name of the conductors, which must be strictly proved. It can make no difference upon the merits of the case which of the two views we take of it, as there remains the averment that injury was due to the negligence of the conductor into whose car plaintiff's intestate's car was run. Furthermore, the demurrer is general and does not point out the defect, if there is any.

The demurrer to plea 4 was properly sustained on the authority of Central of Georgia Ry. Co. *v.* Martin, 138 Ala. 531, 36 South. 426. City ordinances regarding the speed of cars are made for the protection of the public, where they have a right to cross or be upon the track of the railway, and not for the benefit of employees operating cars upon such railways.

The ninth assignment of error was to the action of the court in overruling defendant's demurrer to replication No. 2 as an answer to defendant's plea No. 14. We are of opinion, after

due consideration of this assignment of error, that the court erred in overruling defendant's demurrer to replication No. 2 as an answer to plea No. 14. Plea No. 14 sets up the breach by plaintiff's intestate of a proper and highly salutary rule of defendant, and assigns the same as negligence. The replication admits the rule and the breach, and attempts to justify the breach by stating that there was another rule, or requirement of defendant, by which he was required to make certain points within a certain time. The rule stated in the replication, when construed most strongly against the pleader, as we must, is a general one, which applies under usual and ordinary conditions; whereas, the rule mentioned in the plea was a special rule, and applied only under the special conditions therein mentioned. Where there is a general rule that applies under usual and ordinary conditions, and a special rule which applies under extraordinary conditions, the special rule supersedes the general rule, when such extraordinary conditions obtain. No other construction could give scope for the operation of both rules. A plea, therefore, setting up a breach of the special rule, and averring that such extraordinary conditions existed at the time of the breach, cannot be answered by setting up an observance of the general rule, which applied to usual and ordinary conditions.

Demurrer to replication No. 2 as answer to plea 15 was properly overruled. The replication was a perfect answer to the plea, as both the rule set up in the plea, and the one set up in the replication, were general rules, made to apply under general conditions; and the defendant could not make a schedule for the car of plaintiff's intestate, and also make a rule, which made the schedule impossible under usual and ordinary conditions, and then hold said intestate negligent in doing that which was necessary to make the schedule.

Assignments of errors Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 are all considered and argued together by appellant, and we think properly so. The question involved in these assignments of error was the inquiry by appellee into the financial and physical condition of plaintiff's intestate's mother and his younger brother. We are of opinion that there was no error in the ruling of the court on the matters involved in these assignments of error; and, instead of being contrary to the opinion in the case of Ala. Mineral R. R. Co. *v.* Jones, 121 Ala. 119, 25 South. 814, these rulings are consistent therewith. The object of this inquiry was to show that the said mother and brother were entirely dependent upon plaintiff's intestate for support, and that he was in fact supporting them. As said in the case above cited, where the facts showed that the distributees were minor children of deceased, this court, through Chief Justice McClellan, said: "It is unnecessary, where a recovery is sought of the amount which the deceased would have expended on de-

fendants had his expectancy of life not been disappointed, to prove more *than that he had persons who would have been distributees, had he left an estate, dependent upon him for support, and the amount he contributed to their support,* and there is no legitimate occasion to show the ages of his minor children." The italics above are ours, simply to point out the necessity of the line of inquiry pursued by appellee. If this line of inquiry was legitimate to show that plaintiff's intestate "had persons who would have been distributees, had he left an estate, dependent on him for support, and the amount he contributed to their support," such evidence could not be excluded from the jury because, forsooth, it might have a tendency to increase the amount of the verdict.

Assignments of error 32 and 33 are without merit, in that the question and answer were not subject to the general objections interposed, and appellant's counsel argues a different ground from those interposed.

Assignment of error 34 is without merit. The court properly allowed the reading to the jury that part of defendant's rule book, for the reason that some of defendant's rules were pleaded, and the part read was, in a sense, the inducement to every rule in the book, and therefore part of same.

Assignments of error 35, 36, 37, and 38 are without merit. It was not shown that the signal given by witness was such as was in use by defendant, or that plaintiff's intestate had any knowledge of what it meant. Also assignments 39 and 40 are without merit, as the matter objected to was material and relevant, and to allow a witness to be recalled for further examination, before the examination of witnesses had closed, was within the discretion of the trial court, and no abuse of that discretion is shown.

The forty-second assignment of error is to the refusal of the court to give the following charge requested by defendant: "If the jury believe the evidence in this case, the plaintiff cannot recover under the seventh count of the complaint." Both this and the following written charge requested by defendant were properly refused: "If the jury believe the evidence in this case, plaintiff cannot recover under the fifth count of the complaint." It is a question for the jury, under each count, under all the evidence upon the issues as raised by the pleading, to say whether the conductor in charge of the front car was negligent and thereby proximately caused the injury complained of; and whether or not plaintiff's intestate was guilty of negligence which proximately contributed to his injuries.

Charge No. 5 asked by defendant was properly refused by the court, as all the evidence which would have supported and authorized said charge was properly ruled out by the court.

The assignments of error Nos. 48 to 59, both inclusive, can-

not be considered for the reason that there are no charges in the bill of exceptions which were refused to defendant numbered 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

Charge No. 1 given at the request of plaintiff was properly given. It needs no argument to sustain the ruling of the court. It merely states that if plaintiff's intestate was guilty of negligence, yet, if such negligence did not proximately contribute to his death, then such negligence would not bar the plaintiff's right of recovery. This is elementary.

For the errors pointed out, the case is reversed and remanded. Reversed and remanded.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

JACHETTA *v.* SAN PEDRO, L. A. & S. L. R. Co.

(Supreme Court of Utah, Nov. 8, 1909.)

[105 Pac. Rep. 100.]

Master and Servant—Fellow Servants—Who Are.*—Employees working under a superintendent in repairing the roadbed of a railroad are not, while being carried by a train to their work, fellow servants of the train crew; the employees having nothing to do with the operation of the train, nor with making up the train, and the train crew being governed by rules as to the management and operation of trains distinct from the rules under which the employees perform their work.[1]

Master and Servant—Fellow Servants—Vice Principal.†—One having the general control and supervision of railroad repair work and giving general directions respecting the movements of work trains is a vice principal, and not a fellow servant, of the laborers employed to do repair work.

Master and Servant—Injury to Servant—Negligence—Instructions.—The superintendent of railroad repair work gave directions as to

*For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see foot-note of preceding case.

For the authorities in this series on the question whether the trainmen are fellow servants of other employees of the railroad riding on the train, see foot-note of Texas & Pac. Ry. Co. *v.* Bourman (U. S.), 31 R. R. R. 319, 54 Am. & Eng. R. Cas., N. S., 319.

[1]Daniels *v.* Railway Co., 6 Utah, 357, 23 Pac. 762; Webb *v.* Railway Co., 7 Utah, 363, 26 Pac. 981; Armstrong *v.* Railway Co., 8 Utah 420, 32 Pac. 693; Pool *v.* Southern Pac. Co., 20 Utah, 210, 58 Pac. 326; Morrison *v.* Railway Co., 32 Utah, 85, 88 Pac. 998; Stephani *v.* Southern Pac. Co., 19 Utah, 196, 57 Pac. 34.

†For the illustrations in this series showing who are vice principals or superior servants, see second paragraph of first foot-note of Chicago, etc., Co. *v.* Barker (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228.

the movements of a train that left box cars on the main track. On the following morning he ordered out a train on which laborers doing repair work were carried to their work, knowing that the box cars were on the track. He knew that the train on which the laborers were riding was being operated in violation of the rules of the railroad, but took no precautions to guard against a collision with the box cars. He knew all about the conditions; but he did not inform the laborers of the dangers. Held to warrant the court to submit to the jury the question of negligence of the superintendent causing a collision with the box cars.

Master and Servant—Safe Place to Work—Care Required.—A master must exercise ordinary care to furnish its servants with a reasonably safe place in which to work and to provide for the reasonable safety of the servants in the course of their employment.

Master and Servant—Safe Place to Work—Care Required.—The duty of a railroad to exercise ordinary care to furnish its servants engaged in the work of repairing the roadbed with a reasonably safe place in which to work begins from the time the servants board a train to be carried to their work.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Nick Jachetta, by Raphael Jachetta, his guardian *ad litem,* against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pennel Cherrington and *W. W. Little,* for appellant.
King & Burton and *Samuel Russell,* for respondent.

MCCARTY, J. Plaintiff, Nick Jachetta, by his guardian *ad litem,* Raphael Jachetta, brought this action to recover damages for personal injuries sustained by plaintiff in a collision of a train of cars loaded with lumber and bridge timbers, upon which plaintiff was being carried, with two box cars which had been left standing upon defendant's main line of railroad track. The complaint, among other things, alleges that defendant carelessly and negligently omitted to place any watchman or lookout upon the front of said train, and upon the forward flat car upon which plaintiff was being carried, and negligently failed and omitted to take reasonable precaution to watch the track in advance of said train, and carelessly and negligently caused said train to run at a high and dangerous rate of speed of more than 30 miles per hour, along and over its track, and to collide with two box cars which defendant had carelessly and negligently left standing upon the main line of its track. The answer of defendant denied all the allegations of negligence set out in the complaint and affirmatively alleged that there was no statute in the state of Nevada at the time of the collision in which plaintiff was injured governing

the relation of master and servant, and that the negligence, if any, which caused plaintiff's injuries, was that of his fellow servants. A trial was had to a jury, who found the issues in favor of the plaintiff and assessed his damages at $7,000. From the judgment entered on the verdict, defendant has appealed.

The material facts, briefly stated, are about as follows: In the month of February, 1907, plaintiff was in the employ of the Los Vegas & Tonopah Railroad Company in the state of Nevada. The railroad line of defendant passes through Lincoln county, state of Nevada, and at Los Vegas in said county forms a junction with the Los Vegas & Tonopah Railroad. Plaintiff, with about 300 fellow laborers, all under the direction and supervision of John Conway, who was general foreman and assistant superintendent of construction for the Los Vegas & Tonopah Railroad Company, was engaged in constructing the railroad grade and laying the tracks of said company in the state of Nevada. These laborers, including plaintiff, lived in an outfit train of about 30 cars. On or about February 25, 1907, this outfit train and the laborers mentioned, including plaintiff, were transferred along the line of the Los Vegas & Tonopah Railroad to Los Vegas, and there turned over and delivered to the operatives of the defendant, the San Pedro, Los Angeles & Salt Lake Railroad Company, to be transported along the line of defendant's road to a point where the road had been damaged and rendered impassable for trains by freshets and flood waters. On the 26th and 27th of February, 1907, the outfit train was moved along the line of defendant's road easterly from Los Vegas, during which time plaintiff and his fellow laborers worked under Conway on the road repairing the same where it had been damaged by flood waters. Plaintiff and his fellow laborers still remained in the employ of the Los Vegas & Tonopah Railroad Company and were paid by that company for the labor they performed upon the defendant's road. These men, including the plaintiff, were under the direct control and supervision of Conway, who received orders respecting the work that was being performed from R. K. Brown, defendant's engineer of "maintenance of way." Brown, in his testimony, said that he never spoke to the men (referring to the plaintiff and his fellow laborers).

On the evening of February 27, 1907, the outfit train arrived at Leith, a station on defendant's road about 80 miles east of Los Vegas. At this time the following officials of defendant company were at Leith: Mr. Wells, superintendent, Mr. Tilton, general engineer, Mr. W. H. Smith, trainmaster, and R. K. Brown, the engineer in charge of the construction and repair work on defendant's line of road. Mr. Brown had charge of and directed the rebuilding of the washed out roadbed from Leith to the point where the collision occurred. He had general supervision of this outfit train and crew. He directed the movements of the train and gave

instructions to John Conway, who was in charge of plaintiff and his colaborers, respecting the work of reconstruction as it progressed. On the night of February 27th, Mr. Brown sent a train loaded with material, in charge of Conductor Frank P. O'Chay, two or three miles east of Leith, and two box cars loaded with ties and bridge timbers were left upon the main track near a point where a bridge had been washed out from 160 to 200 feet from the end of a 50 or 60 degree curve in a rock cut. The distance from one end of the curve to the other was from 1,200 to 1,400 feet. The two box cars mentioned could be seen from the center of the cut, but could not be seen from a train approaching from the west until the center of the curve was reached. On the morning of February 28th, the defendant company made up a train at Leith consisting of two flat cars, one of which was loaded with lumber, and the other with bridge timbers, pushed by an engine with a caboose attached to the rear of the engine. The bridge timbers were piled about 5 or 6 feet high upon the cars. Plaintiff and his fellow laborers, about 300 in all, under the direction of John Conway, climbed upon these loaded cars to be carried to their work at the washout. This train was in charge of Conductor O'Chay, who had placed the two box cars mentioned upon the main track the evening before. Mr. Spencer, the engineer of this train, had never been over the road east of Leith before, and he was not advised of the presence of the box cars upon the main track; nor did he receive any special instructions from either the trainmaster or R. K. Brown respecting this work train and the manner in which he should run and operate it on that occasion. Defendant has a book of printed rules which were in force at the time the collision in question occured. One of these rules provides that, "when cars are pushed by an engine, except when shifting and making up trains in yards, a flagman must take a conspicuous position on the front of the leading car and signal the enginemen in case of need." Another rule provides that, when trainmen leave cars standing on the track, they must protect such cars by a trainman and a flag, and immediately notify the chief train dispatcher. Neither of these rules was observed on the morning of the collision. When the work train pulled out from Leith on the morning of February 28th, there was neither a flag nor a flagman on the train; nor was there any member of the train crew on the front car. O'Chay, the conductor in charge of the train, rode in the cab of the engine with the engineer. The cars were pushed down the track at a speed of about 30 miles an hour. This rate of speed was maintained until the train collided with the two box cars that had been left standing on the main track the night before. The force of the collision threw the timbers and men, including the plaintiff, from the flat cars to the ground with great force. It is admitted that one of the timbers "hit plaintiff upon the head, inflicting an injury as a result of which his skull

was fractured and his nerves and brains injured and the sight of his left eye lost."

The evidence shows that the plaintiff was 26 years of age; that prior and up to the time of the accident he was a strong, healthy man, a good workman, and was earning $2 per day. Since the collision, because of the permanent injuries received therein, plaintiff has been unable to perform work of any kind and has to be watched and cared for by others.

The court, among other things, charged the jury: "That plaintiff, by voluntarily going upon the train for the purpose of being carried thereon, assumed the risks ordinarily incident to carriage on said flat cars, and you are instructed that plaintiff assumed the risks of injury from the negligence of the locomotive engineer operating said train; but you are instructed that plaintiff did not thereby assume the risk of harm and injury caused by the negligence, if any there was, of the conductor in charge of said train, and, if you find from a preponderance of the evidence that plaintiff's injury was proximately caused by any negligence on the part of such conductor in respect to the operation of said train and as alleged in the complaint, then your verdict must be for the plaintiff." Appellant complains of this instruction and assigns the giving of it as error. The contention made on behalf of appellant is that Conductor Frank O'Chay, who was in charge of the train, and the men riding on the flat cars, including the plaintiff, were fellow servants. The record shows that at the time the collision in question occurred there was no statute in force in the state of Nevada defining or regulating the relations of master and servant, and that the rule of the common law as to who are fellow servants prevailed in that state. There is a conflict in the authorities as to whether under the common law, a laborer upon a railroad track and the conductor and other employees of moving trains are fellow servants. The federal and many of the state courts have either directly held that they are fellow servants or have so classified employees engaged in the same or different departments, or in different branches of the same department, as to include them in the category of fellow servants. The authorities, upon the general question as to who are and who are not fellow servants, are so at variance and are so numerous that it would be useless for us to attempt to classify and review them. We shall therefore confine ourselves to a review of a few of the decisions of this court in which the doctrine of fellow servants was involved, and a reference to a few decisions of other courts in which the doctrine as declared by this court is illustrated.

In the case of Daniels *v.* Railway Company, 6 Utah, 357, 23 Pac. 762, it was held that a car inspector was not a fellow servant with a train brakeman. In this case the court seems to have followed the rule as announced by the Supreme Court of Illinois in the case of Railroad Co. *v.* Kelly, 127 Ill. 637, 21 N. E. 203. In

that case it was decided that a section hand was not a fellow servant of the engineer of a construction train. In Webb *v.* Railway Co., 7 Utah, 363, 26 Pac. 981, a car repairer was held not to be a fellow servant of a switch engine crew. So in the case of Armstrong *v.* Railway Co., 8 Utah, 420, 32 Pac. 693, it was held that the foreman of a crew employed in switching cars in the yards of the railway company was not a fellow servant of a member of another train crew switching cars in the same yards under the direction of another foreman. Likewise, in the case of Pool *v.* Southern Pac. Co., 20 Utah, 210, 58 Pac. 326, in an elaborate opinion by Mr. Justice Baskin, it was held that a car repairer, who was directed to repair a car standing on the track in the company's yards and went under the car for the purpose of making the repairs as directed, was not a fellow servant of a foreman of a switching crew operating in the same yards. Morrison *v.* Railroad Company, 32 Utah, 85, 88 Pac. 998, was a case in which the defendant, who is also the defendant in the case at bar, was engaged in constructing its line of railroad through the state of Nevada. Morrison was a locomotive engineer and operating one of the defendant's trains known as "work trains, extra," used for the transportation of workmen and material from Caliente, the terminal of the completed portion of the road, to the point where the construction work was being prosecuted. As stated in the opinion, "the country through which the road was building was rough and mountainous, and the right of way lay through many deep canyons, and the curves were long and numerous." The work train on which Morrison was engineer collided with another work train in one of the rock cuts, and Morrison was injured. The evidence tended to show that the collision was due to the negligence of one Branen who was general foreman and trainmaster, in failing to enforce the rules and orders promulgated for the running of these "work trains." At the time of the accident, Branen was on the train with which the Morrison train collided, and knew that the train on which he was riding was being operated in violation of the rules, but did nothing to enforce the rules or to guard against accidents that might occur because of their violation. In that case it was contended on behalf of the company that Branen and Morrison were fellow servants; but this court held that Branen was a vice principal, and not a fellow servant.

Tested by the general rule as declared in these cases, which we have no inclination to depart from, we are clearly of the opinion that plaintiff and the conductor, Frank O'Chay, were not fellow servants, and that the court did not err in so instructing the jury. Counsel for appellant cites and relies on the case of Stephani *v.* Southern Pac. Co., 19 Utah, 196, 57 Pac. 34. In that case the plaintiff, who was a track walker, and whose duty it was to watch the track, was run down by an engine that was moving at the rate

of about 10 miles an hour. The court, in commenting upon the facts, says: "The plaintiff was a common track walker engaged in keeping the track in repair so that trains could pass up and down the road in safety. A wreck having occurred, he was sent ahead by the section boss on a railroad velocipede to notify certain members of the section gang to come and assist in removing the wreck. The engineer and fireman were sent back west with the engine and tender to reach a turntable so as to turn around and return to assist in removing the same wreck on the same road on which the plaintiff was working. * * * In this case the plaintiff and the engineer were sent on the same errand. They were working to clear the track from a wreck. They both started on the same errand and were working with the same object in view. The plaintiff knew the engine was following him. He was aware of the danger he was in." And the court says: "The plaintiff and the engineer were in the same department of labor, working for the same object, under a common master. * * * Each, on entering the service and undertaking to remove the wreck, took the risk of the negligence of the other in performing their respective services."

It will thus be observed that the case was decided upon the theory that at the time of the accident Stephani and the engineer were engaged in the same department of labor, and that Stephani assumed the risks caused by moving trains generally in passing over the road, as one of the ordinary risks and hazards of his employment. In the case under consideration the plaintiff clearly was not employed in, nor was he performing, any service in the same department of labor as the conductor. Neither plaintiff, nor any of his fellow laborers who were riding on the flat cars, had anything whatever to do with the operation or management of the train. They did not load the cars nor help make up the train, and were in no sense attachees of the train either as operatives or laborers. The conductor and the members of the train crew were governed and guided by certain rules and regulations respecting the management and operation of trains which were separate and distinct from the rules and regulations under which plaintiff and his fellow laborers performed their work. That these two crews of men did not work together or in the same department, even temporarily, is conclusively shown by the evidence of R. K. Brown, under whose direction the repair work of the road was being prosecuted. He said: "I told O'Chay this morning (February 28th) to take these men out to work, and the train was made up under my direction, and the conductor started out at my request. * * * The only instructions were to Conductor O'Chay to take the men to the front and come back." True, plaintiff and his fellow laborers, for the purpose of being carried to their work, and for that purpose only, were, for the time being, under the control of O'Chay; but this did not make

them and O'Chay fellow servants. They neither worked with nor under O'Chay, but were employed in another department separate and distinct from the one in which he was engaged. Another distinguishing feature of the Stephani Case and the case at bar is that in the Stephani Case the injured servant was not under the direction nor subject to the control of the offending servant, nor was one superior to the other, nor was the offending servant performing master's duties. In this case O'Chay, as conductor, was performing master's duties, and the plaintiff was, for the purpose of being transferred to his work, under his direction and subject to his control.

Counsel for appellant also cites and relies on the case of Owens *v.* San Pedro, etc., R. R. Co., 32 Utah, 208, 89 Pac. 825. In that case a gang of workmen of the same grade were pushing a hand car which they had loaded with lumber. The men were working together, and the hand car was one of the implements used by them in performing their work. One of the men used a 2-inch by 4-inch scantling for a brake on the car, and in trying to check the speed of the car with this improvised brake the car was thrown off the track. It was held, and correctly so, that the plaintiff assumed the risk, and that the injury resulted from the acts of a fellow servant. In the case under consideration the men under Conway, including plaintiff, and the train operatives, were engaged in two separate and distinct lines of employment. In the prosecution of the repair work on the road, Conway had no authority over O'Chay, the conductor, or any other member of the train crew; nor did O'Chay have any authority over Conway or any of his gang of laborers, and, as we have hereinbefore observed, neither plaintiff nor any of his fellow laborers had anything whatever to do with operating the train upon which they were being carried to their work when the collision complained of occurred. Therefore the facts in the Owens Case and the principles therein involved are entirely different from the facts in this case and the questions presented by this appeal.

Appellant also assigns as error the giving of the following instructions to the jury: "You are instructed that the constructing engineer, Brown, was not a fellow servant of plaintiff, but was the vice principal of the defendant, and for whose negligence, if any there was, the defendant is responsible in the same manner and to the same extent as for the acts or omissions of the conductor of the train." Counsel for appellant, in discussing this assignment in his printed brief, says: "This instruction was wrong, in that it allowed the jury to find Brown guilty of negligence, when, as a matter of fact, there is not a word in the record tending to show, or from which the jury could properly find, negligence on his part." The record shows that Brown was a representative of defendant and had general control and supervision of the repair work, and it is admitted that he was a vice principal,

and not a fellow servant. The undisputed evidence shows that he gave general directions respecting the movements of the work trains east of Leith; that he ordered the train out that left the box cars upon the track the night before the collision occurred; that he also ordered out the train upon which plaintiff and his fellow laborers were carried to their work on the morning of February 28th, well knowing that the box cars referred to were standing upon the track; that he knew this train upon which plaintiff was riding was being operated in violation of the printed rules of the railroad company; that he took no precautions whatever to guard against a collision with the box cars that were left upon the track the night before; that he had been to the washout where the collision occurred many times and knew all about the conditions at that point; that he did not inform the plaintiff, and the plaintiff did not know, of the dangers to which he was exposed because of the presence of the box cars upon the main track, and the failure of the defendant to take the proper precautions to guard against a collision. These facts and circumstances, which are not disputed, fully warranted the court in submitting to the jury the question as to whether Brown was guilty of negligence.

The court also instructed the jury: "It is the duty of the master to exercise ordinary care and prudence to furnish its servants with a reasonably safe place in which to perform the labor which devolves upon them by virtue of their employment, and generally to provide for the reasonable safety of the servant in the course of the employment, and, if the master fails in the performance of its duty in this particular, it is negligence on the part of the master, and the master is liable to the servant if injury results thereby, if the servant himself is without fault which proximately contributes to his injury." This instruction contains a correct statement of the law respecting the general duties of a master to use ordinary care to furnish his servants with a reasonably safe place in which to perform the work required of them under their contract of employment. In the present case this duty was imposed upon defendant from the time plaintiff and his fellow laborers boarded the flat cars and placed themselves under the direct control and supervision of O'Chay, the conductor of the train, for the purpose of being carried to their work.

Appellant has assigned several other errors; but we do not deem them of sufficient importance to warrant discussion.

The judgment is affirmed, with costs to respondent.

STRAUP, C. J., and FRICK, J., concur.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* ROMANS.

(Supreme Court of Texas, Nov. 3, 1909.)

[121 S. W. Rep. 1104.]

Master and Servant—Injuries to Servant—Places for Work—Questions for Jury.—In an action by a railroad employee for injuries received by stepping into a concealed hole while shoveling ballast into cars, evidence held insufficient to go to the jury on the question whether defendant was negligent in placing an inexperienced hand at work with the ground in that condition.

Master and Servant—"Fellow Servants."*—Where men are employed by a railroad company to load cars, and each man is paid according to the work done and each worked separately and independently of the others in different places, and had no control over the work, they are not fellow servants, although they are employed in the same grade and character of the work.

Master and Servant—Questions for Jury—Cause of Injury.—In an action against a railroad company for injuries to an employee received while loading a car, evidence held to make the condition which really caused plaintiff's injury a question for the jury.

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. W. Romans against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appealed to the Court of Civil Appeals, where the judgment was affirmed (114 S. W. 157), and it brings error. Reversed and remanded.

Coke, Miller & Coke and *Jno. T. Craddock,* for plaintiff in error.

B. O. Evans, Thompson & Meade, and *C. L. Elder,* for defendant in error.

WILLIAMS, J. The defendant in error recovered the judgment from which this writ of error is prosecuted for damages for a personal injury received by him in the service of the plaintiff in error. The facts upon which his right of recovery depends are thus stated by the Court of Civil Appeals: "Plaintiff at the time of the injury was in the employ of defendant, loading cars with gumbo at a plant owned and controlled by defendant. At said plant there were three large embankments of burnt gumbo in parallel rows several hundred yards in length, probably 100 feet wide, and 12 to 15 feet high. These embankments were made originally by scooping out a ditch in the ground, piling dirt, old timbers, and coal therein, in alternate layers, and burning the

*See first foot-note of preceding case.

black soil in this way so as to form a ballast known as 'burnt gumbo.' When the ballast in these embankments was ready to be moved, flat cars were run in on a track built parallel with and near to the edge of one of the embankments, and the ballast was thrown upon these cars with scoop shovels by men employed to do that at so much per car. These men so employed in loading the cars worked independently of each other, and according to their own methods and practically in their own time, there being, however, a foreman who inspected the cars as to quality and quantity when loaded, accepted them when sufficiently loaded, and gave to the individual loader credit for the car at the agreed price. The loading was begun at the outer edge of the embankment, and, when a few feet from the side of the embankment had been thus loaded and removed, the track crew would move the track nearer to the embankment from time to time, and the loading would then proceed until the whole of the embankment had been loaded. * * * Plaintiff had partly loaded a car when he stopped work for the night, and, when he returned next morning, the car had been moved some hundred feet or more from the position it occupied the evening before. In attempting to throw a shovel of gumbo on the car, he made a misstep, and his foot went into a hole, which caused him to fall across a ridge of gumbo that had formed along the edge of the cross-ties by some of the gumbo falling as it was being loaded, and thereby hurt himself as complained of. The hole into which he stepped and caused his fall was approximately 2½ feet long, 2 feet wide, and 1½ feet deep. This hole was filled, or nearly so, with fine dust or soot from the gumbo, which obscured the hole, and said hole was not seen by plaintiff, nor was its existence known to him. Plaintiff was inexperienced in the work, having only been employed at this work five days, a Sunday intervening. Defendant had a track crew out there who worked on and moved the track and leveled up the ground when necessary. The evidence fails to disclose how the hole came to be there, nor is the evidence sufficient as to circumstances to warrant a conjecture as to how it was produced." It is not to be understood from this statement that the evidence showed that the track on which stood the car which was being loaded by plaintiff had ever been moved, or that the track crew had ever worked over this ground after first laying the track, or that the condition had even arisen in which it would have been their duty to go over it. These things are all left to conjecture.

We must hold that the evidence is legally insufficient to give rise to any just inference of negligence on the part of the defendant. The fact upon which plaintiff must found a right of recovery is the existence of a hole concealed by the soft matter with which it was apparently filled; for we cannot agree that such a hole unconcealed at a place like this would be any more dangerous or any more evidence of negligence than a like hole would be if lo-

cated by a wagon into which a servant is shoveling dirt or other matter. The risk from such a condition would be so slight and so obvious that the servant might well be expected to guard himself against it, and this would require no more experience than is possessed by the average adult. The place here in question is not like a depot platform, or a railroad track, or other similar place, and the same diligence in keeping it is not to be expected. There might be negligence in causing or permitting the existence of a hole concealed as this one was at any place where people ought to be expected to pass, but, to show it, the evidence must justify the inference that some of the employees of the defendant for whose conduct it is responsible caused that condition, or knew, or with ordinary care would have known, of its existence and have remedied it before plaintiff was hurt, and that some such happening as that of plaintiff's hurt could reasonably have been anticipated. As the Court of Civil Appeals have said, it cannot in any way be inferred how this hole was caused. The evidence fails to supply any fact from which any one can say when, how, or by whom the condition which made the use of the premises dangerous to plaintiff was produced. The evidence equally fails to show that the condition had existed so long as to justify an inference that the defendant knew, or by the exercise of any degree of diligence that could be exacted of it ought to have known, of it before plaintiff was hurt. If we undertake to determine the responsibility of the defendant for the acts or omissions of any of its servants, or of any class of its servants, we are at once confronted with the inquiry, what servant, or class of servants, caused or negligently permitted this condition? No hypothesis on which liability could be founded is supported by evidence, unless it is true that the mere existence of the hole in the condition described by the witness is of itself evidence of negligence. This could only be said if it were true that a hole so situated could not probably have existed without knowledge on part of some employee of defendant for whose negligence it is responsible, supposing that employee had exercised proper diligence; and it seems obvious that this is not true. The very gist of plaintiff's complaint is that the hole was concealed. It is not shown that any one ever saw it before the accident. It may have existed before the bed was laid, or have been caused in the burning, or have been excavated in the removal of the gumbo, or afterwards, and may have become filled as described by the witnesses at any stage of the work. It does not even appear whether or not the whole was in ground before covered by the gumbo beds. The Court of Civil Appeals says that the defendant ought not to have put an inexperienced servant to work at such a dangerous place, but this assumes the very fact to be proved, which is that the defendant is chargeable with knowledge of the condition that made the place dangerous. Besides, we cannot see that inexperience of the plain-

tiff has anything to do with the question. The concealed hole was as dangerous to an experienced as to an inexperienced servant, and either would have had sufficient knowledge to avoid such a risk if known to him.

It is further said that the track crew should have remedied the condition, but it is not shown that they had been over the ground after first laying the track, or that the circumstances had ever existed in which, in the proper discharge of their duties, they should have gone over it, or that had they done so the hole would have been discoverable by them. It does not appear that the hole was in existence and discernible at any time when they had worked or should have worked about this place. This incompleteness of the evidence renders it impracticable to discuss several of the questions of law raised by the parties with any certainty that they are the real questions in the case. For instance, the Court of Civil Appeals held that those who worked in filling other cars with gumbo at other times and places than those at which plaintiff was hurt were not his fellow servants, and to this we agree. They were not working at the same time and place nor on the same piece of work. But how is it possible to say that any act of those servants produced the condition in question, or, if so, that such act was negligent, when we cannot even conjecture how the hole was caused?

The court of Civil Appeals further says: "That the place where the work of shoveling ballast was being done was constantly changing in the progress of the work does not affect the question at issue. It is true that the shoveling of the gumbo from the ground would have a tendency to leave the surface of the ground uneven, but not to the extent that it was so rendered by the hole into which the plaintiff slipped and caused him to fall. There is no evidence showing any other hole in like dimensions on the ground, or one that approximated its extent similarly situated; therefore such changing conditions have no application to this proposition." There was evidence of a statement of the plaintiff that he was hurt because he stood in an unusually low place, and had to throw higher, and there was evidence that the bed of the pit was made by the use of scrapers, not as level as a floor, but as level as the scrapers would leave it. It is evident that in shoveling the gumbo from such a place inequalities in the ground might be produced, and the mere doing of such work might produce transitory conditions the mere allowance of which would not constitute negligence on the part of the employer. The particular spots where shoveling was to be done were not permanent places kept by the master wherein the servant was to do his work, but were temporarily used and constantly changing. What the condition really was that caused plaintiff's injury was a question for the jury under proper instructions.

There is a qualification, applicable to such situations, of the

general principle as to the master's duty in keeping the places where his servants are to do their work. Labatt, Master and Servant, § 588; 26 Cyc. 1324. Whether or not this should be given in a charge to the jury will, of course, depend on the facts developed at another trial, and whether or not those facts are sufficient to authorize the submission of the cause to a jury. As the evidence now stands, it furnishes no legal basis for a recovery by plaintiff.

Because of the insufficiency of the evidence the judgment must be reversed; but, as the facts may be more fully developed at another trial, the cause will be remanded.

Reversed and remanded.

BERGLUND *v.* ILLINOIS CENT. R. CO.

(Supreme Court of Minnesota, Dec. 24, 1909.)

[123 N. W. Rep. 928.]

Master and Servant—"Fellow Servant"—Foreman of Switching Crew—Promise to Repair Appliances.*—The foreman is not the "fellow servant" of a switching crew in the performance of such duties as are peculiar to his position as foreman. He is presumptively the representative of the master, to report on the safety of the instrumentalities with which the crew are obliged to work, and a promise to a member of the crew that a defective footboard on an engine would be repaired is binding on the company.

Master and Servant—Injury to Servant—Disregard of Company Rules.—That a rule of a railway company, forbidding switchmen to mount the footboard of a moving engine, had been disregarded in practice, may be shown under the issues of assumption of risk and contributory negligence.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Peter O. Berglund against the Illinois Central Railroad Company. Verdict for defendant. From an order granting a new trial, it appeals. Affirmed.

How, Butler & Mitchell, for appellant.
T. D. Sheehan, for respondent.

*See last paragraph of foot-note of Texas & Pac. Ry. Co. *v.* Bourman (U. S.), 31 R. R. R. 319, 54 Am. & Eng. R. Cas., N. S., 319; foot-note of Tills *v.* Great Northern Ry. Co. (Wash.), 31 R. R. R. 391, 54 Am. & Eng. R. Cas., N. S., 291; Indianapolis, etc., Co. *v.* Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

LEWIS, J. Action to recover damages for personal injuries sustained by respondent while employed as a switchman in appellant's railroad yards at Freeport, Ill. Respondent claims that the footboard on the front of the engine was defective, in that it slanted back and down about 1½ or 2 inches, and as he stepped upon it, while the engine was moving at the rate of 2 or 3 miles an hour, his foot slipped off by reason of such defect, and he fell under the footboard, and his foot was crushed between the front wheel of the pony trucks and the rail.

The action is founded on the defective condition of the footboard and upon appellant's promise to repair the same. The defense interposed is that the accident did not occur in the manner stated by respondent, but that his foot was caught between the drawbars of the engine and an adjoining car, by reason of his negligent act in attempting to kick the drawbar while making a coupling; but that, if the accident did happen in the manner claimed by respondent, he assumed the risk and was guilty of contributory negligence. The jury returned a verdict for appellant, and the court granted respondent's motion for a new trial, upon the ground that it had committed error in excluding evidence as to the custom and practice in the yard with reference to switchmen getting on the footboard of an approaching engine.

Appellant contends in this court that the verdict of the jury was right, because respondent's account of his injuries was incredible, and that, if his story were true, it conclusively appears from the evidence that he assumed the risk and was guilty of contributory negligence, and, further, that the errors of law occurring at the trial, if any, were harmless, and did not justify a new trial.

1. Respondent's account of the accident was that he slipped from the footboard in attempting to step upon it; that he fell in front of the engine, passed under the footboard while clinging to it, and his foot was caught between the front wheel of the pony truck and the rail. The foreman of the switching crew testified that respondent was injured by having his foot caught between the drawbars of the engine and an adjoining car, and that he released him from that position. If this evidence was true, respondent was guilty of negligence for attempting to kick open the drawbar. According to the evidence he was not otherwise bruised, although the space between the footboard and the ties was not more than 12 inches. Respondent's accounts of the accident were conflicting, and the corroborating circumstances meager. The jury apparently refused to accept his story; but the trial court decided that it was a proper case for resubmission on the facts, and we have concluded to abide by the decision.

2. Respondent testified that he discovered the defective condition of the footboard at the beginning of the night's work.

while the engine was on the roundhouse tracks, and called the attention of both the engineer and foreman to the same, protesting against its use, but that it was explained to him that it was the only engine available at the time, and that the foreman told him they would try and get another engine at midnight, or, if not, that he would turn that one in for repairs in the morning, on which promise respondent relied and continued work. That the footboard was defective in the manner claimed by respondent was denied by appellant, and the original board was produced in court, showing it to be in good condition; but the fact that it was in proper condition when brought into court is not conclusive evidence that it was in such condition when attached to the engine at the time of the accident. The condition of the footboard, whether complaint was made to the engineer and foreman, and whether the foreman made any promise with reference to repairs, were questions for the jury under the evidence.

The principal legal question involved is: Assuming that respondent called attention to the defective condition of the footboard and protested against its use, and that the foreman promised it would be turned in for repairs in the morning, and that respondent remained at work relying upon such promise; did the foreman have authority to bind the company in making such promise? As to a part of their work while they were engaged in switching operations, the foreman and the men constituting the crew were fellow servants; but with respect to giving orders and signals the foreman had authority to direct the movements of the others. The foreman and his assistants are sent into the yards to perform services attended with danger, and they should be furnished safe instrumentalities. There was no one else who would have knowledge of such defects except those working with the engine, and presumably it was the duty of the foreman to report to some superior officer when such instrumentalities needed repairs. To that extent the men were not fellow servants. Pieart *v.* C., R. L. & P. Ry. Co., 82 Iowa, 148, 47 N. W. 1017; Chicago, R. I. & P. Ry. Co. *v.* Strong, 288 Ill. 281, 81 N. E. 1011; Railroad *v.* Kenley, 92 Tenn. 207, 21 S. W. 326. Ehmcke *v.* Porter, 45 Minn. 338, 47 N. W. 1066, is not to the contrary, but in recognition of the principle here involved.

3. The rules of the company were introduced in evidence, from which it appeared that switchmen were prohibited from attempting to mount an engine while it was in motion. It was shown satisfactorily that respondent knew this rule, and had subscribed to it when he entered appellant's service. But evidence was offered to show that the rule was a dead letter, and not enforced, and that the universal custom among switchmen was to step on the footboard of an engine when it was moving at a speed of not more than two or three miles an hour. It was important to re-

spondent's case to establish this custom. It was error to exclude this evidence, and the trial court was justified in granting a new trial upon that ground. Fay *v.* M. & St. L. Ry. Co., 30 Minn. 231, 15 N. W. 241; Sprague *v.* Wis. C. Ry. Co., 104 Minn. 61, 116 N. W. 104.

Affirmed.

WRIGHT *v.* CANEY RIVER RY. CO. *et al.*

(Supreme Court of North Carolina, Dec. 23, 1909.)

[66 S. E. Rep. 588.]

Master and Servant—Injuries to Servant—"Railroad"—Fellow-Servant Act.*—A company chartered with the power of eminent domain, and authorized to construct railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., though its chief purpose was to exploit certain timber land and market the timber thereon, was a "railroad," and subject to the fellow-servant act (Priv. Laws 1897, p. 83, c. 56), and hence such company and the trustee in charge and control were responsible for actionable negligence in the operation of the road under a lease and in the exercise of the franchise.

Trusts—Trust Fund—Torts of Trustee—Liability.—As a general rule, a trust fund cannot be subjected to legal liability for the torts of the trustee or his agents or employees.

Railroads—Torts of Trustee—Liabilities.—A trustee, under a deed for the benefit of creditors, to whom a railroad was leased to carry out the trust purposes, under the supervision and control of the creditors, was liable in his official capacity and to the extent of the property conveyed for negligent injury to an employee of the railroad.

Domicile—Evidence—Declarations.—The declarations of a person on a question of domicile as to his intent in going to a given place are relevant when reasonably free from suspicion.

Appeal from Superior Court, Yancey County; J. S. Adams, Judge.

Action by Cornelia Wright, administratrix of Turner Wright, against the Caney River Railway Company and others. Judgment for plaintiff, and defendants appeal. No error.

The action was instituted by Cornelia Wright, as administratrix of Turner Wright, deceased, on the 1st day of August, 1907, against the Caney River Railway Company, C. J. Morrow, trustee for creditors of the Wood-Galloway Company, operating the road at the time under a sublease, and Wm. Whitmer & Sons, Incorporated, original lessee of defendant road and one of the

*See extensive note, 29 R. R. R. 42, 52 Am. & Eng. R. Cas., N. S., 42.

principle creditors of the Wood-Galloway Company; and there was evidence to show that on July 13, 1907, Turner Wright, intestate of plaintiff, an engineer, while operating an engine in one of defendant's trains, was killed by the giving away of a defective trestle of defendant company's road, and under circumstances indicating negligence on part of defendants. Defendants answered denying that plaintiff was the duly qualified administratrix of deceased, denied that the trestle was negligently constructed, claiming that same was caused to give away by the wrongful conduct of two boys in turning a stream of water on the foundation of the trestle, and thus constituting this intervening negligence of responsible and independent agents as the proximate cause of the injury, and offered evidence in support of these allegations. Defendants contended, further, that in any event the defendant C. J. Morrow, trustee, was not responsible for the wrong in his official capacity as trustee, nor could the trust funds held by him be subjected to the claim of plaintiff. It further appeared that, by virtue of an attachment issued, there were funds of the company in control and custody of the court, available for satisfaction of the claim if it should be declared a valid charge against the trust estate.

Issues were submitted and responded to by the jury as follows: "(1) Was the plaintiff's intestate domiciled in Yancey county at the time of his death? Ans. Yes. (2) Was the plaintiff's intestate, Turner Wright, killed by the wrongful act and negligence of the Caney River Railway Company, as alleged in the complaint? Ans. Yes. (3) Was the plaintiff's intestate, Turner Wright, killed by the wrongful act or negligence of the defendant C. J. Morrow, trustee, as alleged in the complaint? Ans. No. (4) Did the plaintiff's intestate, Turner Wright, by his own negligence, contribute to his death, as alleged in the answer? Ans. No. (5) What damage, if any, is the plaintiff entitled to recover? Ans. $6,000." Judgment on the verdict for plaintiff, and defendants excepted and appealed.

S. J. Ervin, for appellants.
Hudgins, Watson & Johnston, for appellee.

HOKE, J. (after stating the facts as above). The defendant company was organized under a charter conferring the power of eminent domain, and the privilege of constructing tramways, railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., and while its chief purpose was, no doubt, to exploit certain timber lands and market the timber growing thereon, for all purposes relevant to the present inquiry it is considered and held as a "railroad," and subject to the regulations and liabilities affecting such companies, including the statute known as the fellow-servant act (Priv. Laws. 1897, p. 83, c. 56; Hemphill *v.* Railway, 141 N. C. 487, 54 S. E. 420), and

from this it follows that the defendant railway and the trustee in charge and control at the time are responsible for actionable negligence done in the operation of the road under the lease and in the exercise of the franchise (Mabry *v.* Railway, 139 N. C. 388, 52 S. E. 124, citing Harden *v.* Railroad, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; Logan *v.* Railroad, 116 N. C. 940, 21 S. E. 959; Aycock *v.* Railroad, 89 N. C. 321). It is chiefly urged for error that the defendant C. J. Morrow, trustee, has been held liable in his official capacity, and the trust fund subjected to the payment of this claim; but we are of opinion that, on the facts presented here, the objection cannot be sustained. It is true, as a general rule, that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agents and employees; but this doctrine ordinarily exists in the case of passive trusts, or when active in those instances where the power and duties of the trustee are so defined and restricted by the law, or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent does not and cannot prevail. Thus, in McLean *v.* McLean, 88 N. C. 394, and several cases of like import cited and relied upon by defendants, it was held that a liability arising out of a transaction with an executor or administrator is personal in its nature, and will not, as a rule, be considered as an obligation of the estate. This is on the ground that these officers act under power conferred by the law for the purpose of settlement and distribution according to facts and conditions existent at the time of the death of the deceased, and the power to charge the estate or create liabilities against it is not recognized, unless contained in the will. Though even here if it is shown that an obligation has been assumed by an executor for the protection of the estate, and has inured to its benefit, its payment will usually be allowed him in an account with the distributees. But no such limitation can be allowed on the facts presented here. It appears that the Wood-Galloway Company, a corporation, owners of large timber interests in the counties of Mitchell and Yancey, and elsewhere, and also of large amounts of lumber placed in various yards in said counties, estimated at several millions of feet, having become embarrassed, on the 7th day of June, 1907, conveyed the same to C. J. Morrow, trustee, with power to haul out and market said lumber and dispose of the timber lands and other property conveyed, and distribute the proceeds among the creditors mentioned and described in the deed; that on the 5th day of June, 1907, two days before the date of the said deed, the Wm. Whitmer & Sons, Incorporated, one of the principal creditors of the Wood-Galloway Company, and *cestuis que* trust in the said deed, sublet to the trustee in same the railroad company for carrying out the purpose of the trust, and the trustee took charge of the road, and was using and operating the same in haul-

ing out the lumber, and otherwise carrying out the purposes of the trust, when the intestate was killed. Among others, the instrument contains the following provisions:

"For the purpose of carrying this trust into effect, it shall be the duty of C. J. Morrow, trustee, aforesaid, after giving a bond in the sum of fifteen thousand ($15,000.00) dollars, with good and sufficient security, to be approved by the Unaka National Bank and City National Bank of Johnson City, Tennessee, to at once take charge of all said property for the benefit of said creditors, to take an invoice of the whole of said property as early as practicable and as convenient, and to furnish a copy of said invoice to each of the creditors above named; to immediately deliver said lumber on sticks in piles or other conditions on board the cars at Huntdale, North Carolina, from there to be shipped under the direction of Wm. Whitmer & Sons, Incorporated, or other persons whom the majority of the creditors in money may select, for which said Wm. Whitmer & Sons, Incorporated, are to receive 5 per cent. commission on entire sale of lumber and trade discount 2 per cent. thirty days for shipment, the said trustee making copies, one of which shall be preserved by said trustee, one to be forwarded to the said Whitmer & Sons, Incorporated, and the third to be deposited in the Unaka National Bank of Johnson City, Tennessee, for the use and benefit of the said creditors hereinabove named, and further copies to each of the other creditors above named. It shall be the duty of the trustee aforesaid to make an estimate of the quantity and value of all the standing timber or timber remaining uncut of every character and description and to furnish a copy of said estimate to Wm. Whitmer & Sons, Incorporated, and deposit one copy with the Unaka National Bank of Johnson City, Tenn., and each of the above creditors above named, for the use and benefit of the creditors hereinbefore named, and retain a copy of same in his own offices, which shall be subject to the inspection and examination by said creditors at any and all times, to be done at as early a date as practicable and convenient, to sell all the said standing timber remaining uncut for cash to the best advantage to all the parties therein concerned; and to make sale and disposition of the aforesaid timber it shall be the duty of the trustee aforesaid, before any offer for said timber shall be accepted, to submit the price in writing to the creditors hereinbefore named; that the said trustee shall make monthly statement of the amount realized from the sale of said lumber and timber on or before the first day of each month, and he shall at no time retain in his possession or control a sum greater than five thousand ($5,000.00) dollars of the proceeds of said sale; but he shall at all times deposit and keep on deposit at the Unaka National Bank of Johnson City, Tennessee, proceeds of said sale of the said timber and lumber, and shall distribute and prorate the money arising from said

sale among the creditors herein named, less the expense of handling the same and the operating expenses of the Caney River Railway Company, which he may deduct from any moneys in his hands, furnishing an itemized statement on or before the first of each month of all expenses in conducting the said operation, and whenever he shall have on hand a sum equal to five thousand ($5,000.00) dollars, the same shall be distributed among the creditors herein named by prorating the amount according to the respective amounts due and owing each of the creditors above named. The said trustee shall receive as a salary the sum of ($125.00) per month and his expenses from the time he enters upon his duty and until he discharges his trust, the same to be deducted and retained monthly in his monthly statement of expense. It is further understood and agreed between the Wood-Galloway Company and the bank creditors, above named, that the said creditors shall have the right and it shall be their duty to furnish a competent inspector to inspect said lumber, whose duty it shall be to inspect and grade all such lumber, observing the rules prescribed by the National Hardwood Lumber Association, and the books and records of said trustee and inspector aforesaid shall at all times be open to the inspection of any or all of said parties concerned, their agents or representatives, to this transaction."

It will thus be seen that, under a lease to him in his capacity as trustee, and under the powers contained in this deed *inter partes,* the defendant C. J. Morrow, in the use and operation of the railroad, was acting throughout with the sanction and for the benefit of the creditors, the *cestuis que* trust, and to a large extent under their supervision and control, and should be held responsible certainly to the extent of the property conveyed and in evidence for both the contracts and torts of their trustee, made and committed within the scope of his powers and in furtherance of their interests. Sawyer *v.* Railroad, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716; Jackson *v.* Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738. Not only is this true under the general principles of imputed responsibility indicated in these cases, but, on authority more directly opposite, the defendant Morrow should be held liable in his official capacity. Thus, in Mersey Docks Board *v.* Gibbs, Lord Westbury lays down the proposition that trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust; and in Bennett *v.* Wyndham, De Gex, Fisher & Jones, vol. 4, p. 359, it was held that trustees should be indemnified out of the trust estate, by reason of a recovery had against them for negligence of employees in carrying out an order given in the management of the estate. Applying the same principle in the case of Miller, Trustee, *v.* Smythe, 92 Ga. 154, 18 S. E. 46, the court held: "1. Where a trustee legally and rightfully assumes in his representative capacity the relation of landlord, he is liable, in

that capacity, to answer to the tenant for the violation of any duty which the general law attaches as an incident to that relation. Accordingly, where a trustee, duly authorized, rented a store belonging to the trust estate, and in the contract of rental agreed to keep the shelving in the store in thorough order and repair, the trust estate is liable for damages occasioned by his failure so to do." And a ruling substantially similar has been made by our own court in Cheatham *v.* Rowland, 92 N. C. 340. In that case it was held that the trust fund could be subjected to a liability created by the trustees in the performance of their duty concerning the trustee's property, and that the trustee only was required to be made a party in order to afford appropriate relief. The cases cited and relied upon by counsel for defendant, or some of them, seem to have proceeded on the principle that the acts of the trustee by which a liability was sought to be imposed upon the trust estate were not within the scope of the powers contemplated and conferred by the deed, or they were cases where the estate and the entire dominion over it for the purpose of the trust were placed in the trustee, and the beneficiaries had no right of interference and control in its management. In Parmenter *v.* Barstow *et al.*, Trustees, 22 R. I. 245, 47 Atl. 365, 63 L. R. A. 227, plaintiff passing along the highway had her eye injured by chips and pieces of stone flying in her face, and attributed it to the negligence of defendant's "agents and servants," engaged in cutting and chiseling stone on the premises. The facts of this case are not given with sufficient fullness to enable us to consider it satisfactorily in reference to the question presented here; but it does not appear in any report of the case to which we have access that the trustees were occupying the premises or carrying on the business indicated in furtherance of the trust, or that the beneficiaries had any direct interest in or control over it of any kind; and so in Falardeau *v.* Boston Art Students' Association, 182 Mass. 405, 65 N. E. 797, the entire interest in a lease on a building was assigned to trustees for the remainder of the term, and responsibility of the corporation, the assignor, for negligence of the employees and servants of the trustees in the management of the building was denied, because it appeared that the trustee had the entire and exclusive control of the property, and the employees could in no sense be considered the agents of the corporation.

But in our case the beneficiaries were parties to the deed. The operation of the road for their benefit was clearly contemplated, its expenses provided for, and they were expressly given the right of interference and control in the main purpose of the trust, to wit, the disposition of the lumber, etc. Other decisions apparently adverse were rendered on the ground that the claim was asserted in a court of law, and a recovery could not be made effective without threatening the integrity of the

trust fund and the entire frustration of its chiefest purposes; but no such objection can obtain here, in a court having full jurisdiction of legal and equitable issues, and where a part of the trust fund is in the control and custody of the court and available in satisfaction of the claim. We must not be understood as questioning in any way the position upheld in Taylor *v.* Mayo, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163, and Mitchell *v.* Whitlock, 121 N. C. 166, 28 S. E. 292, to the effect that a trustee is personally bound for his contract or acts done in the management of the estate, unless it is otherwise expressly or clearly stipulated. In Mitchell *v.* Whitlock, *supra,* the principle referred to is thus stated: "A trustee purchasing goods or incurring any other liability is personally liable for the payment thereof, unless his liability is limited by an agreement expressed or implied with the creditor." In Taylor's Case, *supra,* it appeared that Charles Davis, a retiring trustee, having a claim for fees and expenses giving him a lien on the trust assets, turned over the fund to his successors, who gave him their written obligation, signed as trustees, that they would apply the funds of the estate in payment of his claim as they came to hand. The estate having become insolvent and the assets exhausted, in suit by the administratrix of Davis, the trustees were held individually liable, and the principle was declared: "That if a trustee contracting for the benefit of the trust wants to protect himself from individual liability in the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trustee." But in neither of these cases was it held that the trust estate could not also be held responsible to the creditor, or that the defendants, the succeeding trustees, on payment of the demand, could not be reimbursed from the funds of the estate if there had been such funds available for the purpose. And in the present case, no doubt, the defendant Morrow could have been sued and held liable as an individual, because the intestate was one of his employees; but responsibility also attaches to the trust estate, and will be imputed to the beneficiaries, who are parties to the deed and were allowed and took part in its actual management and control.

There is no merit in the other exceptions, and they were very properly not insisted on. The amendment allowed made no substantial change in the nature of the demand, and we have seen at the outset that our act as to fellow servants applies to the defendant road and its lessee operating the same as well. Further, the declarations of a person on a question of domicile as to his intent in going to a given place are always considered relevant, certainly when reasonably free from suspicion. 1 Greenleaf, 162c. And the charge of the court as to the burden of proof is in accord with our recent decisions on the subject. Overcash *v.*

Electric Co., 144 N. C. 576, 57 S. E. 377; Stewart *v.* Railway, 137 N. C. 687, 50 S. E. 312.

There is no reversible error shown, and the judgment below will be affirmed.

No error.

PITTSBURGH RYS. CO. *v.* THOMAS.

(Circuit Court of Appeals, Third Circuit, November 29, 1909.)

[174 Fed. Rep. 591.]

Master and Servant—Injuries to Servant—Employment of Competent Fellow Servants.*—A master is liable for failure to exercise the care of an ordinarily prudent man to select servants competent for the performance of duties required of them in accordance with the character of the employment and the dangers to be anticipated; such being a primary and nondelegable duty.

Master and Servant—Risks Assumed by Servant.*—While a servant assumes the risk of negligence of a fellow servant, he does not assume the risk of negligence of the master in employing an incompetent servant.

Master and Servant—Injuries to Servant—Burden of Proof.†—Where a servant's injuries were alleged to have been caused by the master's negligence in employing or retaining an incompetent servant, the burden of proof thereof was on plaintiff.

Master and Servant—Injuries to Servant—Incompetent Fellow Servant—Employment—Negligence.—In an action for injuries to a street car conductor by the alleged negligence of his motorman, evidence held to require submission to the jury of the question of the railroad company's negligence in employing the motorman or retaining him in its employ with knowledge of his alleged incapacity.

Master and Servant—Injuries to Servant—Fellow Servants—Incompetency—Evidence—Special Acts.—On an issue as to a master's negligence in retaining a servant with notice of his incompetency, previous specific acts of the servant, indicating incompetency or unfitness, which were or should have been known to the master, are admissible.

Master and Servant—Fellow Servants—Negligence—Negligent Employment—Specific Acts.—In order that prior specific acts of negligence by a fellow servant should be sufficient to establish the master's negligence in retaining the servant in his employ, the acts must

*See last foot-note of Still *v.* San Francisco & N. W. Ry. Co. (Cal.), 31 R. R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680; second foot-note of Indianapolis, etc., Co. *v.* Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

†See foot-note of Louisville & N. R. Co. *v.* Caldwell (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560.

be the result of incompetence, or of such a character and so constantly committed as to constitute a habit of negligence; rendering the servant unfit to be retained in his position.

Master and Servant—Injuries to Servant—Fellow Servant—Negligent Employment—Special Findings.—Where a master was charged with negligence in retaining in its employ plaintiff's fellow servant by whose negligence plaintiff was injured, prior specific acts committed by such fellow servants were inadmissible to show negligence, but only to show his incompetency; and hence the court erred in submitting such acts to the jury under interrogatories: "Would you, if you were trying that case, say that the motorman was guilty of negligence, or was it the result of his incapacity, which would mean the same thing?" "Was he incompetent in the operation of his car?" "Was his conduct negligence?" "That if he could have avoided either of the accidents with the skill that a motorman is supposed to have in running a car, then it would be the result of his negligence and evidence of his incompetency."

Master and Servant—Incompetency of Fellow Servant—Character—Reputation in a Particular Calling.—Where it was claimed that a motorman was so incompetent that the street railway company was negligent in employing him, evidence that his reputation for competency as a motorman, among the conductors and motormen who daily congregated to the number of 30 or 40 in the car barn, was bad, was admissible.

In error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by David T. Thomas against the Pittsburgh Railways Company. From a judgment for plaintiff, defendant brings error. Reversed.

James C. Gray, for plaintiff in error.
Rody P. Marshall, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The defendant in error, David F. Thomas (hereinafter called the plaintiff), brought suit against the Pittsburgh Railways Company, the plaintiff in error (hereinafter called the defendant), to recover damages for injuries to the said plaintiff, occasioned by the alleged negligence of the defendant. There was a verdict, and judgment thereon, in favor of the plaintiff. From the record brought up by the writ of error sued out by the defendant, it appears that the defendant was a corporation of the state of Pennsylvania, operating certain electric street railways in what was formerly called the city of Allegheny, but what is now a part of the city of Pittsburgh. On the 27th day of November, 1907, the plaintiff was a conductor on a motor car on one of the lines in said city. When he arrived at the end of said line, it became his duty to attach a trailer car, which was standing there,

to what was then the front of his car but which would be the rear of his car on the return trip to the city. The motorman, one Conway, having stopped the car a distance of from two and a half to five feet from the trailer car, the plaintiff went between the two cars for the purpose of coupling them, and, standing somewhat to one side and holding the drawhead and pin, one in each hand, made a signal to the motorman to move his car up in order to make the coupling. The plaintiff says that after the signal was given, the car came so quickly that he remembered nothing, except that it caught him and crushed him between it and the trailer. The plaintiff had been for some time running on this particular line, but says that he had never before had Conway as a motorman. Conway testifies that when he received the signal to close upon the trailer, he put on only what is called one notch of power, the least that would serve to move the car. The plaintiff says that from his five years' experience in motor cars, it could not have come as quickly as it did without more than two notches of power. He also says that it was slightly upgrade at that point, and more power would be required on that account. There was testimony of two or three witnesses, who were 1½ or 2 blocks away, that their attention was called to the accident by hearing the crash of the two cars coming together.

The negligence charged by the plaintiff's statement of claim is the primary negligence of the defendant, as master, in employing Conway, the motorman, who, it was alleged, was incompetent, to the knowledge of the defendant, or in retaining him in its employ after it had, or should have had, knowledge of his incompetence. The charge of negligence is not entirely clear or apt in the language employed to express it. The rule of law invoked, however, is the undoubted one, that it is the duty of the master to use due care, that is, the care that would be exercised by an ordinarily prudent man, under the circumstances of the particular case, to select servants competent and fit for the performance of the duties required of them. This care, of course, must have regard to the character of the employment and to the dangers that may result to others, including co-employees, from the lack of such competence or fitness. This, as we have said, is a primary duty of the master, and cannot be delegated by him so as to avoid responsibility for its due performance. While one who enters the service of another takes, as a risk of his employment, the risk of negligence of a fellow servant, he never assumes the risk of the negligence of the master.

The charge here made, that the injuries suffered by the plaintiff were due to the negligence of the defendant, in employing or retaining in his employ one who was incompetent or unfit for the service required of him, and that such incompetence or unfitness was known, or ought to have been known, to the defendant prior to the accident, must be proved, like every other charge of

negligence, by a preponderance of testimony to the satisfaction of the tribunal trying the same. The burden of proof, of course, is always on the plaintiff.

After the conculsion of the testimony, counsel for the defense asked for binding instructions that, under all the evidence, the verdict should be for the defense, and, after verdict in favor of the plaintiff, made a motion for judgment *non obstante veredicto,* under the Pennsylvania statute. Assignments of error to the refusal of the court to allow these motions were duly filed.

After a careful reading of the testimony, we think that these assignments should not be allowed. The question was a close one, but we think there was evidence to be submitted to the jury, tending to show the incompetence and unfitness of the motorman for the position in which he was placed; also tending to show that the defendant had knowledge, or might have had knowledge, by due inquiry, of such incompetence and unfitness; and also evidence tending to show that the action of motorman, which occasioned the accident, was due to such incompetence and unfitness. As to all three of the points just mentioned, it is incumbent upon the plaintiff to satisfy the jury. We by no means intend to be understood as saying that there was such a preponderance of evidence as should satisfy the jury on this point, or that the jury might not have found that the specific negligence charged against the defendant had not been proved, but merely that there were facts proved in the case from which the jury might, in the exercise of their judgment, infer such negligence, and that the court were therefore justified in submitting, with proper instructions, the question to the jury.

The third specification of error raises the interesting question, whether prior specific acts of alleged negligence on the part of the motorman can be submitted to the jury, in order to establish his incompetency or unfitness. This question is a difficult one, and the decisions of the courts have not been uniform in regard to it. On the one hand, it is held that only evidence of general reputation of incompetency or unfitness, and not knowledge of specific acts of negligence, can be admitted to make a master amenable to the charge of negligence in selecting a servant. "Character," says the Supreme Court of Pennsylvania, in Frazier *v.* P. R. R., 38 Pa. 104, 80 Am. Dec. 467, "grows out of special acts, but is not proved by them. Indeed special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. * * * Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." This is true, and the courts constantly make the discrimination, where the question is as to the veracity of a party or witness, between character or reputation and specific acts of falsehood. But it would be unphilosophical and do violence to the common

sense and experience of mankind, to say that there may not be repeated specific acts showing incompetence or unfitness in a particular employment, or a continued line of conduct amounting to a habit of negligence in the performance of a given duty, as would render one, with knowledge of such specific acts or such a habit on the part of the person he was about to employ, negligent of his duty to those who should thereafter come within the danger of such incompetence or negligence. But we have no hesitation, where the question is as to negligence of the master in retaining a servant in his employ after he knows, or has reason to know, that he is incompetent or unfit for the service for which he is employed, in holding that previous specific acts of the servant, tending to show incompetence or unfitness on his part, which were or should have been known by the master, are admissible in proof of the master's negligence. The practical application of this proposition requires to be guarded by such instructions from the court as shall make clear the essential difference between mere negligence and incompetency. A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfitness, as well as incompetency, is a disqualification for employment. A man may be in the abstract competent for the work in hand; that is, he may be mentally alert, quick of comprehension and understanding, and possessing the requisite experience and skill for the performance of the duty assigned him, but he may be so unfit, by reason of habits of intoxication or reckless carelessness, as to render a master negligent who knowingly employs him.

Keeping in mind these distinctions, we come to consider the specifications of error pertinent thereto. The two specific accidents in which the motorman, Conway, was concerned, and which were adduced to show incompetence on his part, taken by themselves, hardly present sufficient ground for the inference sought to be drawn from them. Their character is principally proved by the motorman himself, and his explanation of the circumstances under which they occurred would seem to exonerate him from responsibility or blame. In one case, he testifies that he ran into the rear of a car which had suddenly stopped by reason of bumping into another car ahead of it. As it was in the early hours of a November morning, and very foggy, he testifies that he could only see ahead as far as his headlight shone, about 15 yards, and that the fog had made the rails so slippery that, by reason thereof, he was unable to stop his own car in time to

avoid the collision. In the other case, which happened in the previous September, he testified as follows:

"The Rebecca Street car was going ahead of me, up Preble avenue, and there is a bridge there for the people going up California avenue, and just as his car was passing, an old man got off the bridge and signaled for the motorman ahead of me to stop the car. It was not a regular stop, and I was coming after him about 50 yards, and before I could stop my car, I slightly touched him."

This is practically the only evidence as to the happening of the two accidents, evidence of which was introduced, not to show negligence, for that would not have been pertinent, but to show incompetence. Standing alone, they do not have probative force in that respect, and should have been withdrawn from the consideration of the jury.

There was, however, other evidence undoubtedly pertinent, as tending to show incompetence. This was the testimony of several of the conductors and motormen who daily congregated, to the number of 30 or 40, in the car barn, to the effect that the reputation of Conway, for competence as a motorman, was bad. This testimony was objected to, on the ground that it was not general reputation and only confined to a class. We think, however, that reputation or character in a special employment or calling, is competently proved—indeed, is best proved, as it exists among those of the same calling. It is the general reputation among those best capable of forming an opinion in regard to the same. This testimony, however, is not conclusive, and should be of such a character as to satisfy the jury that it should have come to the knowledge of the defendant.

Undoubtedly, great weight was added to this evidence of reputation by the admission of the testimony in regard to the previous accidents to which reference has been made, and the court, with entire correctness and fairness, submitted to the jury the general questions as to reputation and as to the facts surrounding the accidents. But our attention has been called to certain language used by the learned judge of the court below, as set forth in the last four assignments of error. Speaking of the first of the two prior accidents, the learned judge used this language:

"Would you, if you were trying that case, say that the motorman was guilty of negligence, or was it the result of his incompetency, which would be the same thing?"

This, of course, is erroneous, in view of the distinctions which we have heretofore endeavored to point out. A merely negligent act, and an act which is the result of incompetence, are not the same thing. As we have already pointed out, he may have been entirely competent, and yet have committed an act of negligence. In speaking of the second accident, this language is used:

"Was he incompetent in the operation of his car on Preble ave-

nue? Was his conduct negligent? Now you see you must determine the fact of this accident as bearing upon the question of incompetency. Of course, if he could have avoided either of these accidents with the skill that a motorman is supposed to have, in running a car, then it would be the result of his negligence, and it would be evidence of his incompetency, so, you see that you are to determine that."

The use of this language was evidently the result of inadvertence on the part of the trial judge, but this inadvertence, in the course of the delivery of an oral charge, could hardly fail to confuse in the minds of the jury the distinction that exists between incompetence and the mere negligence of one who is competent, and tended to give a probative force to the occurrence of these prior accidents, to which they were not properly entitled. Special care is required in a case like the one at bar, to avoid possible confusion in this regard, by fully explaining to the jury the distinction to which we have adverted.

For the reasons stated, the judgment below is reversed, and a venire *de novo* ordered.

BENNETT v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, Dec. 22, 1909. Rehearing Denied Feb. 2, 1910.)

[90 N. E. Rep. 735.]

Master and Servant—Fellow Servants—Who Are—Question of Law and Fact.—Whether servants of a common master are fellow servants is a mixed question of law and fact, as the definition of "fellow servants" is a question of law, while the question of the relation of fellow servants is one of fact, unless the undisputed evidence, with legitimate inferences, is such that all reasonable men must reach the same conclusion, in which case it is a question of law.

Master and Servant—"Fellow Servants"—Who Are.*—To create the relation of fellow servants, the servants must be directly cooperating with each other in the same work, or their duties must be such as to bring them into habitual association, so as to afford them the power and opportunity of exercising a mutual influence on each other promotive of proper caution.

Master and Servant—Fellow Servants—Who Are.*—A conductor on a cable car operated on a street, and a motorman on an electric car

*For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see last foot-note of Louisville & N. R. Co. v. Clark (Ky.), 29 R. R. R. 595, 52 Am. & Eng. R. Cas., N. S., 595; fourth foot-note of Indianapolis, etc., Co. v. Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

operated by the same company on a street crossing the first at right angles, are not as a matter of law fellow servants, where the employees on the two lines are under the control of different superintendents in charge of different car barns, and the lines are not operated on a schedule requiring the meeting of the cars at the crossing, though rules of the company require, when cars on the lines meet at the crossing, that cable cars shall have the right of way, and though on a signal from the gripman the motorman may cross first.

Trial—Instructions—Construction as a Whole—Effect of Error.—Where the court correctly instructed on the burden of proof, and the instructions, when taken together, did not mislead the jury on the question, the error, if any, in a charge on the subject, was not ground for reversal.

Master and Servant—Injury to Servant—Contributory Negligence—Question for Jury.—Whether a conductor on a cable car injured in a collision with an electric car at a crossing was guilty of contributory negligence held, under the evidence, for the jury.

Appeal and Error—Harmless Error—Instructions.—Where the verdict was not inconsistent with the hypothesis that everything testified to by the witnesses of the defeated party was true, the error, if any, in a charge that the jury might consider the fact that any witness was in the employ of either of the parties in determining the weight of the testimony, was not reversible.

Evidence—Best Evidence.—The best evidence of the fact that a master has a rule imposing a duty on a servant is the rule itself, so that it is not error to refuse to permit the servant to testify as to his duty.

Master and Servant—Issues—Rules of Employment—Evidence.—Where there was no contention that a rule of the master was habitually violated with his knowledge, proof that the servants customarily obeyed the rule was properly excluded.

Master and Servant—Injury—Declaration.—The declaration, in an action for injuries to a servant through the negligence of a co-servant, must expressly allege that the latter was not a fellow servant, or it is demurrable.

Pleading—Defects—Aider by Verdict.—Where the declaration, in an action for injuries to a servant through the negligence of a co-servant, set out the facts showing the relation of the parties, and the issue joined required on the trial proof of the facts, the defect in the declaration, due to the failure to expressly allege that the co-servant was not a fellow servant, was cured by the verdict and was sufficient as against a motion in arrest.

Pleading—Sufficiency—Verdict.—Where there is an entire verdict on several counts in favor of plaintiff, it will not be set aside because the declaration containing one or more good counts contains a defective count.

Dunn, Cartwright, and Hand, JJ., dissenting.

Appeal from Branch Appellate Court, First District, on ap-

peal from Superior Court, Cook County; Arthur H. Frost, Judge.

Action by Adolph Bennett against the Chicago City Railway Company. From a judgment of the Appellate Court (141 Ill. App. 560) affirming a judgment for plaintiff, defendant appeals. Affirmed.

S. S. Page and *C. Le Roy Brown* (*John R. Harrington*, of counsel), for appellant.

James E. McGrath, for appellee.

CARTER, J. This is an action on the case brought by the appellee against appellant in the superior court of Cook county for injuries alleged to have occurred on the afternoon of June 14, 1902. A judgment for appellee was recovered in the trial court, which, on appeal, was affirmed by the Appellate Court, and the record is brought here by appeal for further review.

At the close of appellee's evidence, and again at the close of all the evidence, appellant requested the court to direct a verdict in its favor as to each of the five counts in the declaration. This last motion was sustained as to the second, fourth, and fifth counts, and overruled as to the first and third counts, and the case was submitted to the jury on the two last-named counts. It is contended that the instructions as to both these counts should have been given because the court should have held, under the facts in this case, as a matter of law, that appellee was a fellow servant with the person whose negligence caused his injury.

On the date of the accident the appellant was operating double-track street railways on Cottage Grove avenue and Sixty-Third street, which crossed each other at right angles; Sixty-Third street running east and west, and Cottage Grove avenue north and south. The cars on Cottage Grove avenue were operated by a cable and ran out of car barns at Thirty-Ninth street and Cottage Grove avenue. The employees on that line were under the control and direction of James H. Flynn, as superintendent. The Sixty-Third street cars were operated by electricity and were sent from car barns at Sixty-First and State streets, and the employees of this line were under the control and direction of another superintendent than Mr. Flynn. At the time of the accident, appellee was conductor on the rear car of a Cottage Grove avenue train consisting of a grip car and two open passenger cars, the seats of which extended crosswise of the cars. Under the rules of the company, it was appellee's duty to be upon the rear platform at crossings and intersections, so as to observe teams or other obstructions upon the track and avoid collisions or other danger. It was, however, also his duty to look after his passengers, collect fares, and give transfers. In order to discharge these duties, it was necessary for him to pass from one end of the car to the other on the running board. Appellee was on the running

board on the west side of his car, collecting fares and giving out transfers, with his face to the car and his back to the west, when the Sixty-Third street intersection was being crossed. By the rules of the company the cable trains on Cottage Grove avenue had the right of way at the crossing, and, if cars on the two different lines arrived at the crossing at the same time, it was the duty of the motorman on the Sixty-Third street car to stop and let the cable train pass. The evidence tends to show that sometimes a Cottage Grove car would find its track near the crossing obstructed by teams or otherwise, and in such case, if a trolley car was waiting, the gripman on the Cottage Grove avenue car would indicate, by nodding his head to the motorman on the trolley car, that he might cross ahead of the cable car. When an electric car stopped to permit a cable car to clear the crossing, the cars would not ordinarily be closer than 40 feet to each other. There is no evidence of any communication between the employees on the two car lines, except the occasional indication that might be given by the gripman on the Cottage Grove car to the motorman to pass ahead across the intersection, as stated above. The evidence shows that while the Cottage Grove avenue car on which appellee was conductor was passing over the intersection and going not to exceed two miles per hour, having slowed down to make a stop on the south side of Sixty-Third street, an electric car going east on Sixty-Third street ran into the Cottage Grove avenue car, injuring appellee severely. The evidence also tends to show that when a short distance from Cottage Grove avenue the motorman made an attempt to stop the trolley car; but the tracks were so greasy and slippery that the car did not respond readily to the brake. There was an elevated railroad on Sixty-Third street, which contributed to keep the tracks greasy and slippery. The motorman applied the brakes; but the wheels kept sliding. He then reversed the power and put sand on the track and made every effort to stop the car, which gradually slowed down but continued moving slowly eastward, running into the last car of the cable train and striking appellee, who was standing on the running board. On this state of facts, were appellee and the motorman on the Sixty-Third street car fellow servants as a matter of law?

Whether two persons, servants of a common master in a given case, are fellow servants, is a mixed question of law and fact. Lake Erie & Western Railroad Co. *v.* Middleton, 142 Ill. 550, 32 N. E. 453. The definition of "fellow servants" is a question of law. Indianapolis & St. Louis Railroad Co. *v.* Morgenstern, 160 Ill. 216; Hartley *v.* Chicago & Alton Railroad Co., 197 Ill. 440, 64 N. E. 382. The question of the relation of fellow servants is ordinarily one of fact, and only becomes a question of law when there is no dispute with reference to the facts, and the evidence, with all legitimate inferences to be drawn therefrom, is such that

all reasonable and intelligent men must reach the same conclusion. Illinois Southern Railway Co. *v.* Marshall, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; Chicago, Rock Island & Pacific Railway Co. *v.* Strong, 228 Ill. 281, 81 N. E. 1011; Chicago & Eastern Illinois Railroad Co. *v.* Driscoll, 176 Ill. 330, 52 N. E. 921. By the decisions in this state the exemption of the master from liability is confined within narrower limits than those usually recognized by other courts. Under the rule as laid down in this state, to create the relation of fellow servants the servants must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into habitual association so as to afford them the power and opportunity of exercising a mutual influence upon each other promotive of proper caution. North Chicago Rolling-Mill Co. *v.* Johnson, 114 Ill. 57, 29 N. E. 186. The reasons for this doctrine were fully discussed and the authorities reviewed by this court in Chicago & Northwestern Railroad Co *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168, and that rule has been consistently followed by this court since that time. In that case it was said that the rule of respondent superior rested upon the consideration of public policy and is founded on the expediency of placing the risk upon those who can best guard against it, and that the liability of the master turned upon the same consideration. In Chicago City Railway Co. *v.* Leach, 208 Ill. 198, 205, 70 N. E. 222, 224 (100 Am. St. Rep. 216), this court said on this subject: "This is the principle underlying the application of the doctrine whether it was adopted on grounds of public policy or because the risk is assumed by the servant in entering the service, and the relation is made to depend upon the existence of association between servants which enables them, better than the employer, to guard against risks or accidents resulting from the negligence of each other."

It is not claimed by counsel for appellant that appellee was a fellow servant of the motorman on the electric car under the first branch of this rule; but it is insisted that under the second branch the two men were fellow servants as a matter of law. It is argued that this relationship does not rest upon the personal acquaintance between appellee and the motorman, but upon whether the classes of employees to which they respectfully belong are fellow servants. Under the decisions in this state the relationship of fellow servants does not necessarily depend upon personal acquaintanceship alone, or the length of time persons have worked together. World's Columbian Exposition *v.* Lehigh, 196 Ill. 612, 63 N. E. 1089; Chicago City Railway Co. *v.* Leach, *supra;* Chicago & Eastern Illinois Railroad Co. *v.* White, 209 Ill. 127, 70 N. E. 588. The rule established in this state holding that certain persons are fellow servants, however, has as its basis, in some measure at least, such personal relation and association between

them as to afford an opportunity and power to influence each other through proper caution, by counsel, advice, or example, whether under the first or the second branch of the rule. Pagels *v.* Meyer, 193 Ill. 172, 179, 61 N. E. 1111, 1113. This court in that case said: "Where they are brought together in direct co-operation in the performance of a particular work, * * * they have such opportunity and power and are brought within the relation required by the rule. Where their usual duties bring them into habitual association, the association must be sufficiently personal to furnish the same opportunity and power to exercise an influence upon each other promotive of proper caution."

It is most earnestly urged by appellant that under the reasoning of this court in Chicago City Railway Co. *v.* Leach, *supra,* the motormen and conductors on the Sixty-Third street line, as a matter of law, were fellow servants with the gripmen and conductors of the Cottage Grove avenue line under the second branch of this rule, and that therefore the motorman here in question and appellee necessarily were fellow servants under that branch of the rule. An examination of the authorities shows that it is not always easy to define who are to be considered as "fellow servants," within the rule laid down by this court. Doubtful cases may arise in which it will be difficult to say, as a matter of law, whether or not certain persons are fellow servants. It may be true that there are expressions in the various cases on this subject which, without reference to the special facts in the given case, may seem incapable of being reconciled; but we think there is no real conflict in the decisions, viewed in the light of each particular set of facts. Under the decisions it is not sufficient to constitute two persons fellow servants simply that they are working for the same master; but they must be brought into such relation, either by directly co-operating in the same work at the time of the injury or by their usual and habitual duties, that they may exercise an influence upon each other promotive of their mutual safety. In addition to the authorities already cited, the following, among many others, sustain this rule: Chicago & Northwestern Railway Co. *v.* Moranda, 108 Ill. 576; Chicago & Eastern Illinois Railroad Co. *v.* Geary, 110 Ill. 383; Abend *v.* Terre Haute & Indianapolis Railroad Co., 111 Ill. 202, 53 Am. Rep. 616; Chicago & Alton Railroad Co. *v.* Hoyt, 122 Ill. 369, 12 N. E. 235; Mobile & Ohio Railroad Co. *v.* Massey, 152 Ill. 144, 38 N. E. 787; Louisville, Evansville & St. Louis Railroad Co. *v.* Hawthorn, 147 Ill. 226, 35 N. E. 534; Chicago & Alton Railroad Co. *v.* O'Brien, 155 Ill. 630, 40 N. E. 1023; Leeper *v.* Terre Haute & Indianapolis Railroad Co., 162 Ill. 215, 44 N. E. 492; Chicago & Alton Railroad Co. *v.* House, 172 Ill. 601, 50 N. E. 151; Meyer *v.* Illinois Central Railroad Co., 177 Ill. 591, 52 N. E. 848; Duffy *v.* Kivilin, 195 Ill. 630, 63 N. E. 503; Chicago & Alton Railroad Co. *v.* Wise, 206 Ill. 453, 69 N. E. 500; Indiana, Illinois & Iowa Railroad Co.

v. Otstot, 212 Ill. 429, 72 N. E. 387; Illinois Steel Co *v.* Ziemkowski, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161.

The facts in this case are readily distinguishable from those in the Leach Case, *supra*. In that case the grip car and trailer of one servant ran immediately behind the grip car and trailer of the other servant, and it was the duty of the one servant so to manage his grip car and trailer as not to run into the train immediately in front of him. The duties of the employees on the two trains were such as to bring them into habitual association, so they would have an opportunity to influence each other by advice and caution. Then, too, they ran out of the same car barn and were under the control and direction of the same superintendent. In this case there was nothing in the rules of the company under which the two car lines were operated which required the meeting of the cars at this crossing. While such meeting was reasonably to be expected occasionally, when it occurred it was by mere chance and not in accordance with any fixed rule. In other words, the two lines were not operated on a schedule requiring particular trains to connect and exchange passengers at this crossing. It is true, the rules provided that when two trains on these two lines met at Sixty-Third street and Cottage Grove avenue the Cottage Grove avenue cars should usually have the right of way; but the proof showed that sometimes, when trains thus met at the crossing, upon a signal from the Cottage Grove avenue gripman the motorman on the Sixty-Third street car would run his car across ahead of the Cottage Grove avenue car. The rules of the company made no provision on this latter point, and it was purely a question of proof as to the practice among the trainmen of the two lines. The trainmen of the two different lines ran out of different barns and were under different superintendents. Even though it be conceded that whether the appellee and the motorman on the Sixty-Third street line were fellow servants depends upon whether the trainmen on the Sixty-Third street line, considered as a class, were fellow servants of the trainmen on the Cottage Grove avenue line, still it could not be held, as a matter of law, that appellee and the motorman were fellow servants. All reasonable minds would not reach the same conclusion on this question on the facts in this case. That question was therefore one of fact that was properly submitted to the jury.

Appellant further contends that the court, in giving instructions 8 and 9, erred, because these instructions erroneously shifted the burden of proof on the fellow-servant question. We are disposed to think the instructions are not open to this criticism. Furthermore, the jury were correctly instructed as to the burden of proof in other instructions given on behalf of appellant. Taking all the instructions together, we do not think the jury were misled on this question.

Appellant further contends that the court committed error in

refusing to direct a verdict in its favor because appellee was guilty of contributory negligence in being on the running board of the car at the time he was injured. On this record it was a question of fact for the jury whether the circumstances shown excused appellee for being in the position he occupied, or whether he was guilty of such negligence as would prevent a recovery.

It is further contended that the court erred in instructing the jury, at the request of appellee, that they might consider the fact that any witness in the case had been or was in the employ of the plaintiff or defendant in determining the weight that ought to be given the testimony of such witness. This instruction was given in Donley *v.* Dougherty, 174 Ill. 582, 51 N. E. 714, and it was there held, on the facts in that case, that the court did not commit substantial or reversible error in so doing. We are disposed to hold that the instruction is not accurate. Under some conditions this court might feel that it was so far misleading as to require a reversal of the judgment; but in the case at bar we think it is obvious that no harm resulted to appellant from its being given. The verdict of the jury is not inconsistent with the hypothesis that everything testified to by appellant's witnesses is absolutely true.

Appellant also contends that the court committed error in the admission and exclusion of evidence. It is argued that the court erred in refusing to allow appellant to ask appellee whether it would be his duty to report an act of negligence on the part of the gripman, motorman, or conductor. If appellant had any rule prescribing such duty, the rule would have been better evidence. There was no error in this ruling.

It is also insisted that the court erred in refusing to allow appellant to prove that it was the general custom of conductors to be upon the rear platforms of their cars at the time they were crossing transfer points. Appellant's rule upon this subject was put in evidence, and the proffered evidence was nothing more than an attempt to show that the conductors customarily obeyed the rule. Such proof would not have added anything to the force of the rule. Had there been any contention that the rule was habitually violated with the knowledge of the company, then such evidence as to custom might have been pertinent.

A motion was made in arrest of judgment, based on the contention that neither of the two counts upon which the cause was submitted to the jury was sufficient to support the judgment. The only objection pointed out to the third count is its omission to aver, in express language, that the servant through whose negligence appellee was injured was not a fellow servant with him. This count should have so stated. Schillinger Bros. Co. *v.* Smith, 225 Ill. 74, 80 N. E. 65. While in this respect the declaration was demurrable, it does not offer any reason for arresting the judgment after verdict. The facts showing the relation of the parties

are fully set out in this count, and the issue joined was such as necessarily required, on the trial proof of these facts. The defect in this count was therefore cured by the verdict. Cribben *v.* Callaghan, 156 Ill. 549, 41 N. E. 178; Chicago & Alton Railroad Co. *v.* Swan, 176 Ill. 424, 52 N. E. 916; 1 Chitty's Pl. (7th Am. Ed.) 722; Chicago & Eastern Illinois Railroad Co. *v.* Hines, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; Sargent C. *v.* Baublis, 215 Ill. 428, 74 N. E. 455. This being so, we do not find it necessary to decide as to the sufficiency of the first count when questioned on motion in arrest of judgment. Where there is an entire verdict on several counts, the verdict will not be set aside because the declaration contains a defective count if there are one or more counts sufficient to sustain a verdict. Consolidated Coal Co. *v.* Scheiber, 167 Ill. 539, 47 N. E. 1052; Illinois Central Railroad Co. *v.* Welland, 179 Ill. 609, 54 N. E. 300; Baltimore & Ohio Southwestern Railway Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197; Swift & Co. *v.* Rutkowski, 182 Ill. 18, 54 N. E. 1038.

We think we have covered all the material points raised and insisted upon as error.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

DUNN, J., dissents.

STATE *ex rel.* GREFFET *et al. v.* WILLIAMS, Judge, *et al.*

(Supreme Court of Missouri, March 7, 1910. Rehearing Denied March 30, 1910. Dissenting Opinion March 30, 1910.)

[127 S. W. Rep. 52.]

Eminent Domain—Condemnation for Railroads—Prerequisites to Right.—A railway company organized under Rev. St. 1899, c. 12, art. 2 (Ann. St. 1906, p. 894), derives from the state authority to condemn lands for railroad purposes, and not from a city or other municipality in which it may desire to enter, and it need not first procure consent of a municipality to use its streets as a prerequisite to its legal right to condemn private property for such purposes.

Eminent Domain—Condemnation for Railroads—Prerequisites to Right.—It does not concern owners of city property sought to be condemned for railroad purposes that the company cannot use the streets without being duly authorized, and might for that reason be unable to reach, use, and occupy the property.

Eminent Domain—Delegation of Power—Interurban Railroads.—Rev. St. 1899, c. 12, art. 2, § 1174a, as added by Act March 19, 1907, provides that any interurban electric railroad corporation shall have the same rights and be subject to the same liabilities and be governed by the same powers, laws, limitations, restrictions, and proceed-

ings governing railroads in such article for condemnation of lands for right of way and the fencing thereof. Held, that this section was in pari materia with articles 2 and 7, containing the law of eminent domain for steam railroads, and in express terms grants to interurban railroads all the powers possessed by steam railroad companies to condemn property.

Eminent Domain—Power of Railroad Company—Right to Question.—The power of a regularly organized and chartered railroad company chartered to construct and operate a railroad for public use in the conveyance of persons or property to run freight trains over its track cannot be questioned in a condemnation proceeding.

Gantt, Burgess, and Fox, JJ., dissenting.

In Banc. Petition for prohibition by the State, on the relation of Julius E. Greffet and another, against George H. Williams, Judge, and others. A preliminary writ is quashed, a permanent writ denied, and the petition dismissed.

Relators instituted this proceeding in this court on August 5, 1909, against the respondents to prohibit Kinsey, Hufft, and Darst, respondents, from taking any action as commissioners appointed by Hon. Geo. H. Williams, one of the judges of the circuit court of the city of St. Louis, to assess compensation to relators for damages sustained by them in a proceeding instituted by the respondent the St. Louis Electric Terminal Railway Company for the purpose of condemning a lot of ground owned by relators, situate in the city of St. Louis. Judge Williams was also made a party. A preliminary writ was ordered and made returnable on the first day of the October term, 1909, of this court. Respondents filed their return thereto, and relators answered, and raised thereby certain questions of fact. Thereupon, by agreement of parties, this court appointed Hon. Moses Sale of the city of St. Louis referee to hear the evidence, make a finding of the facts, and report the same to this court. In compliance with that order, the referee took the evidence, found the facts, and reported them to this court.

While the record covers several hundred pages of printed matter, yet the facts in so far as they are material are comparatively few, and practically undisputed, which are substantially as follows: The respondent the St. Louis Electric Terminal Railway Company is a corporation organized and incorporated under the laws of this state in pursuance to article 2, c. 12, Rev. St. 1899 (Ann. St. 1906, p. 894), with its principal office in the city of St. Louis. The charter of said company authorized and empowered it to construct, maintain, and operate a standard gauge railroad (as stated in the language of counsel for respondents) "for the conveyance of persons and property in the state of Missouri from a point on or near the west bank of the Mississippi river, in the city of St. Louis, running thence in a general westerly, thence

southerly, thence easterly, and thence southerly direction, to a point at or near the west bank of the Mississippi river, with either a single or double track, with spurs, switches, side tracks, branch lines, terminal facilities, and connections from points on the aforesaid route to and connecting said line with the various bridges, bridge terminals, ferries, wharves, ways, landings, railroad yards, depots, manufacturing and shipping establishments which now are or may hereafter be constructed or built, providing complete and continuous terminal facilities, connections, and accommodations within the city of St. Louis for said railway; and said railway was designed and intended for use in connection with the bridge of the St. Louis Electric Bridge over the Mississippi river which is now nearing completion, and said road and said bridge are intended to be used in connection with and as a part of the following named interurban railroad systems in Illinois, viz.: The Illinois Central Traction Company, the St. Louis & Springfield Railway Company, the St. Louis & Northeastern Railway Company, and the Danville & Edwardsville Terminal Railroad Company, corporations organized under the laws of the state of Illinois, in the state of Illinois, and which said Illinois corporations have constructed a system of interurban electric railways in Illinois several hundred miles in length, extending from a point of connection with the St. Louis Electric Bridge in the town of Venice, Ill., on the eastern bank of the Mississippi river opposite St. Louis, and connecting various towns and cities in Illinois with each other, and which said system of interurban electric railways in Illinois in connection with the St. Louis Electric Terminal Railway in Missouri is designed and intended to connect the city of St. Louis by means of said interurban electric railway companies and said bridge across the Mississippi river with different and distant towns and cities in Illinois and other states."

By an ordinance duly enacted and approved April 6, 1907, the city of St. Louis authorized the respondent railway company to construct, operate, and maintain a single or double track electric railway for the carriage of passengers, mail and express matter over, along, and across certain designated streets in the city of St. Louis, prescribing the conditions on which said railway shall be operated and prescribing penalties for the violation thereof.

The first section thereof reads as follows: "Section 1. Permission and authority are hereby given and granted to the St. Louis Electric Terminal Railway Company, a corporation organized under the laws of the state of Missouri, its successors and assigns, to lay down, construct, operate and maintain a single or double track street railway, as hereinafter provided, on, over and along the streets designated in section two of this ordinance; and on, over and across all railway tracks, streets, alleys and other highways, bridges and city blocks and other public

places along the route hereinafter mentioned; together with all appurtenances and all necessary conduits, wires and poles for the purpose of connecting its power house with its lines of railway and transmitting its power to points of consumption. For the sole purpose of connecting any of its stations, depots, yards, car barns or power houses, situated in city blocks immediately adjoining the streets along the route described in section two of this ordinance with its main line of track, said railway company is hereby authorized to construct, operate and maintain such switches and turnouts as may be necessary for such purposes."

By section 2 of said ordinance the route of said railway is set forth, as beginning at Farrar and Ninth streets and running on Branch, Twelfth, Ninth, Eleventh, Palm, and Twelfth streets to Lucas avenue, and on Linden, Thirteenth, and Gay streets, and also over and across all streets and alleys from Ninth street to the Mississippi river, between Farrar and Mallinckrodt streets.

By section 3 it was ordained, among other things, that: "The rights and privileges hereby granted to the St. Louis Electric Terminal Railway Company are for the purpose of establishing and maintaining a street railroad in the city of St. Louis, in connection with and as a part of the following named interurban systems in Illinois: The Illinois Central Traction Company, the St. Louis and Springfield Railway Company, the St. Louis and Northeastern Railway Company and the Danville and Edwardsville Terminal Railroad, corporations organized under the laws of the state of Illinois, in the state of Illinois, and which have constructed a system of interurban railways in said state; and it is hereby stipulated and agreed by the said St. Louis Electric Terminal Railway Company, for itself, its successors and assigns, that within two years after the date of the passage and approval of this ordinance, said street railway shall be connected and operated in connection with the said interurban companies."

Section 4 provides: "The St. Louis Electric Terminal Railroad Company may operate its road by electricity or by any other power authorized by ordinance * * * and all its stations or depots shall be located on property leased or owned by said railway company. No trailer shall be operated in connection with any passenger or express cars in said city, and all trains for the carriage of either passengers or express shall consist of a single car."

Section 5 provides that all necessary poles to carry electric wires may be erected and placed "along the curbs of all streets on, over, across or along which said railroad company may be operated under this ordinance. * * *" The St. Louis Electric Terminal Company may make needful and convenient changes in construction of needful and convenient curves, etc., in any of the streets or railways in, along, or over or across which it may be constructed or operated with permission of the board of public improvements.

Section 7 requires the acceptance of the St. Louis Electric Terminal Railway Company to be filed and bond given for the observance of this ordinance, and all general ordinances in force, or that may be passed with reference to street railways, and to pay damages to adjoining property owners, and save the city harmless from damages because of the "construction, operation or maintenance of said street railway."

Section 10. The St. Louis Electric Terminal Railway Company agrees to comply with all the general ordinances and charter provisions of the city of St. Louis affecting the speed and other operating requirements of street railways then in force or hereafter to be enacted and applicable to its line of road or any part thereof.

And sections 13 and 14 read as follows:

"Sec. 13. The rights and privileges herein conferred upon said St. Louis Electric Terminal Railway Company are granted on the express condition that should the St. Louis Electric Bridge Company fail to build a bridge across the Mississippi river from a point near Venice, in the state of Illinois, to a point in St. Louis, connecting said railway with the lines of railway of the Illinois Traction System within five years from the date of the passage and approval of this ordinance, then the rights and privileges herein granted shall cease and determine: Provided, however, that should the St. Louis Electric Bridge Company be prevented or delayed in building said bridge within said time, either by the act of God, labor strikes or any injunctions or restraining order of any court, then the time shall be extended for a period equivalent to such delay.

"Sec. 14. It is understood and agreed that the St. Louis Electric Bridge Company shall file its written acceptance of this ordinance, and will at the time of such acceptance enter into and give to the city of St. Louis a bond in the penal sum of one hundred thousand dollars, to be approved by the mayor and council, conditioned that the St. Louis Electric Bridge Company shall build and construct a bridge across the Mississippi river as authorized by the act of Congress approved on the fifteenth day of February, nineteen hundred and seven, and shall complete said bridge within the time mentioned in section thirteen of this ordinance, conditioned also that should the St. Louis Electric Bridge Company build said bridge within the time as herein specified, then said bond shall be null and void; otherwise, to remain in full force and effect."

In May, 1907, respondent railway company undertook to agree with relators upon the price to be paid them for the lot of ground in controversy, but was unsuccessful; and on June 22, 1909, in pursuance to its charter powers, said company filed a suit in the circuit court of the city of St. Louis, which had for its purpose the condemnation of this land.

The relators filed an amended answer, in which they denied some of the allegations in the petition, but did not deny the filing of the map of the route, that the railroad would lie wholly within the city of St. Louis, or the ownership of the lot, or that plaintiff offered to purchase relators' lot and was refused, or that petitioners' real intention was to construct and operate a railroad under the general law for the carriage of freight and passengers within the city of St. Louis, or to act as a terminal line; and for further answer charged that the only power or authority of respondent railway company to construct or operate a railroad in the city of St. Louis of any kind was that conferred by the ordinance, approved April 6, 1907, already noticed, and that it merely authorized the construction, maintenance, and operation of a street railroad by respondent railway company under the powers conferred by article 3, c. 12, Rev. St. Mo. 1899 (Ann. St. 1906, p. 994), concerning street railways, and had no power whatever to exercise the right of eminent domain or to take the lot of relators under any power it possesses, nor has any other street railway company. The cause came on for hearing on January 20, 1909, before Judge G. H. Williams, in vacation, and respondent railway company offered in evidence its articles of association and the said ordinance of the city of St. Louis, approved April 6, 1907, already mentioned.

R. D. Smith, on behalf of respondent company, testified that he was the manager and representative of petitioner in Missouri. He testified to the existence of the Illinois System, and named the four electric roads that composed it, and their location at Venice, opposite St. Louis; that the St. Louis Electric Bridge Company has a bridge under construction to connect respondent railroad with the Illinois System, and has a large landed property in St. Louis, near its terminus, and that the tracks of respondent railway company have been laid on a large number of streets in the city of St. Louis; that the bridge company, the respondent railway company's railroad, are subsidiary companies of the Illinois System, and they were carrying passengers, freight, baggage, and express matter, and arranged for freight and all sorts of freight and express matter, and have regular cars for long-distance travel, and that the property sought to be condemned here is to be used to erect depots and places to receive freight and passengers and express in the city of St. Louis.

On August 22, 1909, the court rendered an interlocutory decree of condemnation, and appointed respondents, Kinsey, Huffts, and Darst, commissioners, as before stated, to assess compensation to relator Rosalie Greffet for her lot. In the decree the court states that it finds and decides that respondent railway company was organized under article 2, c. 12, Rev. St. Mo. 1899, "and as such corporation was organized for the purpose of being used and operated in connection with and as a part of said Illinois System,

* * * and that the petitioner is authorized to and is constructing it for the purpose of transporting freight and passengers in connection with said Illinois System and the bridge, and the condemnation of relators' lot is necessary for the public uses described in the petition. He also adjudges that respondent railway company is entitled to take and hold the property for the public use so specified in connection with its business as a public carrier in the transportation of freight and passengers on its said railroad and to furnish room for * * * freight-yards and terminal facilities upon making compensation." The commissioners qualified and proceeded to act as such until August 6, 1909, when they were stopped from further action by the preliminary writ of prohibition, issued from this court on August 5, 1909. Upon this state of the record counsel for respondents moves this court to quash the preliminary writ of prohibition issued, and to dismiss relator's petition filed herein.

Kinealy & Kincaly, for relators.
E. C. Crow, for respondents.

WOODSON, J. (after stating the facts as above). If we correctly understand the position of counsel for relators, it is this: That the respondent railway company is a general railroad corporation organized, incorporated, and existing under and by virtue of article 2, c. 12, Rev. St. 1899; and, as such, has no authority to construct and maintain its railroad tracks in, upon, and across the streets of the city of St. Louis, or to operate its motors and cars therein, without express authority from the city to do so. And relators insist that the city has not authorized the respondent company to so construct its tracks and to so operate its cars. Consequently they contend that the respondent company had no authority to construct, maintain, or operate a railroad over, along, or across the streets of the city of St. Louis, or to condemn land in said city for its use, nor had Judge Williams jurisdiction to do so.

It seems to us that counsel for relators are led into error by attaching undue importance at this time to the ordinance of the city before mentioned, approved April 6, 1907. The respondent company was organized under article 2, c. 12, Rev. St. 1899, and derives its authority from the state of Missouri to condemn lands for railroad purposes, and not from the city of St. Louis, or from any other municipality into which it may desire to enter. Metropolitan Ry. Co. *v.* Chicago West Division Ry. Co., 87 Ill. 317. There is no law requiring a railroad company to first procure the consent of a municipality to the use of its streets as a prerequisite to its legal right to condemn private property for railroad purposes. California Southern Ry. Co. *v.* Kimball, 61 Cal. 90. Suppose, for instance, the ordinance approved April 6, 1907, had never been enacted, could it then be seriously contended that the

respondent company would have no power or authority to condemn relators' property just as it is now undertaking to do? We think not, for the reason that the consent of the city might be obtained after condemnation as well as before. Metropolitan Ry. Co. *v.* Chicago West Div. Ry. Co., *supra*. While it is true, the respondent cannot use the streets of the city without it is duly authorized to do so; and it might for that reason be unable to reach, use, and occupy the property so condemned by it for railroad purposes. However, that is a matter which does not concern relators, for the reason that their land cannot be taken until paid for, and then it can be used for no other purpose than for the purpose for which it was condemned. The sole purpose of a condemnation proceeding is to acquire private property for public use; and the plaintiff therein does not thereby undertake to acquire the right to use the streets of a city or to use and occupy the public roads and highways in the country. The Supreme Courts of California and Illinois have both expressly held that the question as to whether or not the consent of the city to use the streets thereof has been obtained is wholly immaterial in a proceeding to condemn private property, situate therein, for the public use of a legally organized railroad company. California Southern Ry. Co. *v.* Kimball, 61 Cal. 90. Metropolitan Ry. Co. *v.* Chicago West Div. Ry. Co., 87 Ill. 317. We are therefore of the opinion that said position of counsel for relators is not well founded.

2. Counsel for relators more by way of insinuation than by direct assertion contend that the respondent company has no power or authority to condemn private property for railroad purposes under article 2, c. 12, Rev. St. 1899, for the reason that it is not a railroad company within the meaning of said article, but is an interurban electric railroad company, which is not embraced within the provisions of that article. Without stopping to decide that proposition, it is sufficient to state that whatever doubt existed at one time as to that mooted question has been set at rest by an act of the Legislature, approved March 19, 1907. By that act article 2, c. 12, Rev. St. 1899, entitled "Railroads," was amended by adding thereto a new section, numbered 1174a, which reads as follows: "Sec. 1174a. That any corporation now existing, or that may hereafter be incorporated, for the purpose of constructing, building, owning, operating and maintaining an interurban electric railroad, shall have and possess the same rights and be subject to the same liabilities and shall be governed by the same powers, laws, limitations, restrictions and proceedings now governing railroads in article 2 of chapter 12 of the Revised Statutes of Missouri, 1899, for condemnation of lands for right of way, and the fencing thereof." This section is in *pari materia* with articles 2, 7, c. 12, Rev. St. 1899 (Ann. St. 1906, pp. 894, 1033), containing the law of eminent domain for steam railroads,

and in express terms grants to interurban railroad companies all the powers possessed by steam railroad companies to condemn property for its use. This rule is announced in the following cases: Malott *v.* Collinsville, C. & E. St. L. Electric Ry. Co., 108 Fed. 313, 47 C. C. A. 345; Gaston *v.* Lamkin, 115 Mo., *loc. cit.* 33, 21 S. W. 1100; State *ex rel. v.* Dearing, 173 Mo., *loc. cit.* 504, 73 S. W. 485; Sales *v.* Barber *et al.*, 166 Mo., *loc. cit.* 671, 66 S. W. 979; State *ex rel. v.* Patterson, 207 Mo. 129, 105 S. W. 1048. We therefore rule this contention against relators.

3. As before stated, counsel for relators lay much stress upon the fact that the record discloses no authority outside of the ordinance before mentioned, approved April 6, 1907, authorizing the respondent company to construct its tracks upon, along, and across the streets of the city, or to operate its cars thereon; and insist that said ordinance, the one under which said respondent proposed to operate, does not authorize it to operate an interurban railroad in said city, which it proposes to do, but only a street railroad, which can only be organized and operated under article, 3, c. 12, Rev. St. 1899. In other words, counsel for relators contend that the record shows that the respondent company is organized as an interurban railroad company under article 2, c. 12, Rev. St. 1899, as amended by said act of 1907; and, notwithstanding that fact, it proposes to operate such road within the limits of the city of St. Louis under said ordinance, yet in violation of its express provisions, by transporting freight in freight trains to be operated thereon, which is not authorized to be done by said ordinance. Counsel for respondents concedes that the respondent company is an interurban railroad company, and not a street railroad company, and claims that it has the right to operate freight and passenger trains over the same under the ordinance aforesaid. In answer to that contention, it is sufficient to say that it will be ample time to determine that question when the respondent company undertakes to do so. If it should attempt to run freight trains and transport freight over said road in violation of said ordinance, as is contended for by counsel for relators, then there is ample authority to prevent such usurpation of power. That question, however, is not, and cannot be, considered or adjudged in this case, and we decline to consider the same, much less undertake to pass upon it. The court expressly held in the case of Kansas & Texas Ry. Co. *v.* Northwestern Coal & Mining Co., 161 Mo. 288, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717, that the power of a regularly organized and charted railroad company chartered for "the purpose of constructing and operating a railroad for public use in the conveyance of persons or property" to condemn land for a right of way for a railroad track cannot be drawn in question in a condemnation proceeding. The same principle is announced in the following cases: National Dock

Co. *v.* Railroad, 32 N. J. Eq., *loc. cit.* 755-760; Ulmer *v.* Linn Rock Ry. Co., 98 Me. 579, 57 Atl. 1001, 66 L. R. A., *loc. cit.* 395; Sewall's Falls Bridge *v.* Fisk *et al.*, 23 N. H. 171; Metropolitan Ry. Co. *v.* Chicago West Div. Ry. Co., *supra.*

There are many other questions presented and ably discussed by counsel for both parties, but the proper disposition of none of them would change the results before stated, and for that reason we deem it unnecessary to prolong this opinion by deciding them.

We are therefore of the opinion that the preliminary writ of prohibition should be quashed and the permanent writ be denied, and that the petition filed herein should be dismissed. It is so ordered.

All concur, except GANTT, BURGESS, and FOX, JJ., who dissent.

PITTSBURG, C., C. & ST. L. RY. CO. *v.* MUNCIE & PORTLAND TRACTION CO. *et al.*

(Supreme Court of Indiana, April 27, 1910.)

[91 N. E. Rep. 600.]

Appeal and Error—Questions to be Determined—Conclusions of Law.—Where the exceptions to the conclusions of law present the same questions as those presented by the action of the court in overruling demurrers to the answer and the cross-complaint, it is only necessary to determine the correctness of the conclusions of law.

Street Railroads—Crossing Steam Railroad.—A street and interurban railroad carrying freight and passengers, and having the lawful right to construct its lines in a city street, had the right to cross at a grade the tracks of a steam railroad, which owned in fee the land sought to be crossed.

Jordan and Montgomery, JJ., dissenting.

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

Action by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company against the Muncie & Portland Traction Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

G. E. Ross, for appellant.
Frank H. Snyder and *Whitney E. Smith,* for appellees.

MONKS, J. This action was brought by appellant on August 28, 1905, to enjoin appellees from constructing a street and interurban railroad at grade across the railroad tracks of appellant, where said last-named tracks cross Main street, and within the

limits of said street and the incorporated town of Red Key, Ind. Appellees filed an answer of general denial. The traction company filed a separate answer to the complaint. Appellant's demurrer for want of facts to the traction company's separate answer was overruled. On September 5th said traction company filed a cross-complaint, seeking to enjoin appellant from interfering with its track as laid on August 25, 1905, in Main street in the town of Red Key, Ind., and to compel it to restore the part of said track removed on the said day, and from interfering with the right of said traction company to place crossings at the intersection of its track with appellant's main track and passing track in said street within the corporate limits of said town as the same were laid and constructed on the morning of August 25, 1905. Appellant's demurrer for want of facts to said cross-complaint was overruled, and appellant filed an answer thereto. After issues were formed, the case was heard by the court, and a special finding made and conclusions of law stated thereon, to each of which conclusions of law appellant excepted. Final judgment in accordance with the conclusions of law was rendered against appellant on the complaint and cross-complaint. Appellant's motion for a new trial and its motion to modify the judgment were overruled. The errors assigned by appellant call in question each conclusion of law and each ruling of the court adverse to it.

As the exceptions to the conclusions of law present the same questions as those presented by the action of the court in overruling appellant's demurrer to the traction company's answer to the complaint and appellant's demurrer to the traction company's cross-complaint, it is only necessary to determine as to the correctness of the conclusions of law, for such decision necessarily determines the sufficiency of said answer and cross-complaint. State *v.* Spinney, 166 Ind. 282, 284, 76 N. E. 971, and cases cited. Ross *v.* Van Natta, 164 Ind. 557, 558, 74 N. E. 10, and cases cited.

The special findings are, in substance:

That appellant is a railroad corporation organized and existing under the laws of the states of Pennsylvania, Ohio, West Virginia, Illinois, and Indiana, and owns and operates as a common carrier a line of railroad extending from the city of Chicago, Ill., through the states of Indiana, Ohio, and Pennsylvania to the city of Pittsburg in said last-named state. That said line of railroad passes through the town of Red Key, in Jay county, Ind., and crosses Main street in said town at grade. That at said crossing of Main street immediately before August 25, 1905, said appellant had and maintained two tracks, only one main track, and the other a passing track; the last named being in an easterly direction from the other. That said appellant now owns in fee simple, and it and its predecessors have owned in fee simple, and have been in possession of and using for railroad purposes

in the operation of said railroad for more than 30 years continuously last past, at the point where its railroad crosses said Main street in said town of Red Key, a strip of land 80 feet wide as and for its right of way, subject to the easement of the public in said Main street, for the use of the public for street and highway purposes.

Appellant's railroad has been located upon said strip, and the same has been used and said line operated continuously thereon during all of said time in transporting commerce, state and interstate, both passengers and freight, and in carrying the United States mails. That the Muncie & Portland Traction Company, one of the appellees, is and has been since ———, 1905, a street railroad corporation and street and interurban railroad company, duly incorporated under and by virtue of an act of the General Assembly of the state, entitled "An act to provide for the incorporation of the street railroad companies," approved June 4, 1861 (Acts Sp. Sess. 1861, c. 39), and all acts amendatory thereof and supplementary thereto, regulating and authorizing the construction of a street railroad, interurban street railroads, and suburban street railroads. That said traction company was incorporated as a street railroad company for the purpose of constructing, operating, and maintaining an interurban street railroad from the city of Muncie, Ind., through the towns of Albany, Red Key, and Dunkirk to the city of Portland, Ind., and from said last-named city to the boundary line between the states of Indiana and Ohio. That the route of said traction company's road passes through said town of Red Key on and along said Main street, and across the main and passing tracks of appellant within the limits of said street where appellant's said tracks cross the same. That prior to August 25, 1905, the board of trustees of said town of Red Key, by an ordinance duly adopted by said board, granted the right to said traction company to locate, construct, and maintain and operate a single or double track standard guage street railroad upon and along said Main street and that part thereof which is intersected and crossed by appellant's main and passing tracks. That said ordinance and the provisions thereof were duly accepted in writing by said traction company, and its bond duly executed and filed with the clerk of said town, conditioned as in said ordinance provided. That on August 25, 1905, said traction company was engaged in the construction of a street and interurban railroad along its said route, and on the morning of that day made its grade and laid its ties and track in and along the center of said Main street at and on both sides of appellant's tracks at said crossings, which tracks as so laid were from a point about 4 feet distant from the outer rail of said tracks of appellant, and extended therefrom about 33 feet; and the laying of said pieces of the track was completed and the said street replaced in such manner as not to interfere with public traffic on said street

at about 11 o'clock a. m. of said day, and that the laying and construction of said two pieces of track by the traction company was simply for the purpose of hindering and delaying, and if possible preventing, appellant from extending said siding and laying said additional track, unless appellant put in the necessary crossing at the place where said extended siding and additional track cross said pieces of track of the traction company. Said pieces of track were not attached to or connected with any part of the traction company's railroad theretofore constructed; the traction company at that time having no part of its railroad constructed nearer than five miles of said town of Red Key.

That for more than two years prior to August 25, 1905, appellant's business had been such as to require additional tracks in and through said town of Red Key, and at said point where its said railroad crosses said Main street in said town, and about 30 days prior to said 25th day of August, 1905, appellant arranged to lay an additional main track, and to extend westward a siding or loading track then existing, but which was insufficient to answer the purposes for which it was intended; and with the intention of carrying out said plans and to construct said tracks, it delivered materials, and had a large force of men servants and employees at said town of Red Key on or about the noon hour of said 25th day of August, 1905, and then and there began the construction of the extension of its said siding or loading track on the east side of its passing track, northward over and across said Main street, and in making said extension appellant's said servants and employees tore up, removed, and destroyed said piece of track theretofore laid by said traction company on the east side of appellant's said passing track, and, over the objections and protests of appellees, extended its said siding over and across said street, without placing therein any crossing whatever at the points at which the said siding would have intersected the said pieces of track of the said traction company if the same had remained as theretofore laid and constructed in said street. That while appellant was engaged in extending its said siding northward over and across said Main street, the appellees made an effort and tried to prevent appellant from so doing; but, notwithstanding appellees' said efforts, appellant did extend its said siding across said street, and ran a locomotive and several cars upon said track as extended to prevent appellees from tearing up and removing that part of said track across said street, and to prevent said traction company from relaying its said pieces of track therefore torn out by appellant. That said siding as so extended has been in constant use by said appellant in the operation of its said railroad, and is necessary to appellant in the future operation of its said railroad.

That said traction company never acquired any right by condemnation proceedings, nor from the appellant, to build its said

line of railroad across appellant's said railroad and tracks. That the only right that it has acquired to do so is under said ordinance passed by said board of trustees of said town of Red Key, and such rights as are conferred upon it under the laws of Indiana. That although appellant has forbidden appellees to build said interurban railroad across appellant's said railroad at grade, where appellant's said railroad crosses said Main street, appellees threaten to and will proceed to do so, and will build said interurban railroad across appellant's said railroad unless restrained therefrom. That while said traction company claims the right as a street or suburban railroad to construct its railroad track along said Main street in said town of Red Key over and across the right of way, railroad, and tracks of appellant without its consent, and against its wishes, and without having the damages therefrom first assessed and tendered, it is the purpose and intention of the traction company when and after its said line of railroad is constructed, to operate said railroad as a common carrier, "carrying freight and passengers, and engage in the general business of a railroad transporting passengers and freight, not only to points on its own line, but also to receive and transport such passengers and freight from points on other connecting lines to points beyond its said line and upon other lines, not only in this state, but in other states; it being the intention and purpose in constructing said railroad of appellees to make the same a part of a system of railroads extending into and through different states, and to carry commerce, both state and intestate, passengers and freight, which would not otherwise pass over said street. That the traction company intends to place, at the point of intersection by its track of appellant's said main track and said passing track, what is commonly known to railroad engineers as the "Pennsylvania Standard Railway Crossing." That said crossing is designed especially for interurban crossings, and is built of the same weight and style of rails as those used by appellant at said points of intersection, and that the same, when placed in position, will afford security for life and property, and will not necessarily impair the usefulness of appellant company's railway, nor injure its franchise.

That the appellant denies the right of the said traction company to cross its said main track and passing track in said Main street, and denies the right of said traction company to place crossings at said point of intersection. That appellant threatens to hinder, delay, obstruct, and prevent the said traction company in the construction of its said street and interurban railroad over and across appellant's said main track and passing track, and in the placing of crossings at said points of intersection, and that the other appellees are either officers, stockholders, or employees of the traction company, and were parties to the acts hereinbefore found to have been done by and for said traction company, and

they are threatening to build said railroad for the traction company across the right of way, railroad, and tracks of the appellant at grade and tear up that part of appellant's said siding which extends into said Main street, and will do so unless restrained therefrom.

The conclusions of law are, in substance, as follows:

(1) That on August 25, 1905, said traction company was duly authorized to use and occupy Main street, in the town of Red Key, by its street and interurban railroad, and was rightfully in the use and possession of said street, by its tracks on either side of the points at which said street is intersected and crossed by appellant's main track and passing track, and said traction company is entitled to the relief prayed as to the use of said street.

(2) That on said day appellant had no right to dig out and remove the track of said traction company from said Main street.

(3) That said traction company is authorized and empowered and of right entitled to construct its street and interurban railroad over and across the main track and passing track of the appellant in Main street, in said town of Red Key, by placing in position at the points of intersection crossings of such construction and design as that the same will not interfere with the free use of appellant's railroad.

(4) That said traction company is of right entitled to cross with its railroad and tracks the extension of appellant's siding as constructed over and across said Main street on said August 25, 1905, without being put to the expense of maintaining said crossing.

(5) That on the account of the wrongful digging out and removal of the track of the traction company in said Main street by appellant, it ought in equity to restore the said track so dug out and removed, and ought in equity to place, at the points of intersection therein, a crossing of such construction and design as that the same will not interfere with the free use of the street and interurban road of the said traction company, and is entitled to the relief prayed as to the restoring of said track, and as to the placing of a crossing in said siding.

(6) That appellant is not entitled to a perpetual injunction, for the want of equity, and appellees ought to recover their costs.

(7) That said traction company is entitled to an injunction perpetually enjoining the appellant, its officers, agents, servants, and employees from in any wise obstructing, molesting or interfering with the right of said traction company to construct and maintain its street and interurban railroad, tracks, poles, wires, lines, and appliances for operating the same in and along said Main street, and from obstructing, molesting, or interfering with its right to place crossings in said street, at the points of intersection of ap-

pellant's main track and passing track, by the traction company's tracks. That said traction company is further entitled to an order directing the appellant to restore the traction company's track in said Main street as the same was, and to thereafter cease in any manner to interfere with or to obstruct the proper use thereof, and that the traction company ought to recover its costs.

The controlling question in this case is whether or not an interurban street railroad, incorporated under the said act of 1861, and the amendments thereof and supplementary thereto, carrying passengers, baggage, express freight, and the United States mail, as said finding states said traction company intends to do, on and along the streets of a town or city with the consent of and subject to the regulation of such town or city, is an additional burden on the land used for such streets for which the abutting owner who owns the fee in such street is entitled to recover damages. Appellant cites cases from other jurisdictions which hold that the same is an additional burden for which it, as the owner of the fee in said street, has the right to recover damages. It is not necessary for us to review said cases cited by appellant, for the reason that this court, after a careful consideration of all the authorities, has held otherwise; that the same is not such an additional burden and servitude upon the street as to require an assessment and payment of compensation to the abutting lot owners or other owners of the fee in the street as a condition precedent to the occupancy and use of the street by said interurban company, or for which such owners of the fee in the street are entitled to recover damages. Kinsey *v.* Union Traction Company, 169 Ind. 563, 601-634, 81 N. E. 922; Mordhurst *v.* Ft. Wayne, etc., Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222.

It being the law of this state that said interurban railroad is not an additional burden upon said Main street, it had the right to lay its tracks on and along said street and across the main and passing tracks of appellant, with the consent of the board of trustees of said town, and without the consent and against the will of appellant, because the same was a legitimate use of said street under the laws of the state, which appellant was not entitled to enjoin. Chicago, etc., Co. *v.* Whiting, etc., Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; Mordhurst *v.* Ft. Wayne, etc., Co., 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. Rep. 222; Kinsey *v.* Union Traction Co., 169 Ind. 563, 601, 604, 81 N. E. 922. See, also, South East, etc., R. Co. *v.* Evansville, etc., R. Co., 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916, and cases cited; De Grauw *v.* Long Island Electric R. Co., 43 App. Div. 502, 60 N. Y. Supp. 163; Id., 163 N. Y. 579, 57 N. E. 1108; New York, etc., R. Co. *v.* Rhodes, 171 Ind. 521, 86 N. E. 840; Lake Erie, etc., R. Co. *v.* Shelley, 163 Ind. 36, 42-47, 71 N. E. 151, and cases cited: Chicago, etc., R. Co. *v.* West Chicago, etc., R. Co., 156 Ill. 255, 265-272, 40

N. E. 1008, 29 L. R. A. 485; Chicago, etc., R. Co. *v.* City of Chicago, 140 Ill. 309, 29 N. E. 1109; Chicago R. Co. *v.* Town of Cicero, 157 Ill. 48, 41 N. E. 640; West Jersey, etc., R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423; Montgomery *v.* Santa, etc., R. Co., 104 Cal. 166, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89. Said use of the street of a city or town with the consent of such city or town being a legitimate use thereof, and not an additional servitude and burden thereon, it is evident that the ordinance granting the traction company the right to construct and maintain and operate its road on and along said Main street, and the acts of the Legislature granting such power to the cities and towns in the state, is not in violation of either the fourteenth amendment to the Constitution of the United States, or section 21, art. 1, of the Constitution of this state as claimed by appellant. Section 5676, Burns' Ann. St. 1908 (section 5468b, Burns' Ann. St. 1901) requires in a case like this that: "The company owning the road last constructed at such crossing shall, unless otherwise agreed between such companies, be at the exclusive expense of constructing said crossing in a manner to be convenient and safe for both companies." The court's conclusions of law and the judgment rendered required the traction company to pay the expense of construction of said crossing where its track crosses appellant's main and passing tracks, but that appellant pay the expense of constructing the crossing where its switch track crosses the track of the traction company. This was in conformity with said section 5676 (5468b) *supra,* because the traction company's track was, at the point where it crossed the main and passing track of appellant, "the road last constructed," and appellant's switch track was, at a point where it crosses the traction company's track in Main street, "the road last constructed," because it was constructed after the traction company's track had been constructed at that point. The fact that the traction company constructed its track at that point for the purpose of avoiding the expense of such switch track crossing makes no difference. It had the right to construct its track at said point when it did; and, when appellant in the construction of its switch track found the traction track at that point, it should have put in a proper crossing at its own expense, instead of removing the traction company's track.

Appellant insists that it was entitled in this action to prevent said traction company from crossing its tracks at grade, under section 5151a, Burns' Ann. St. 1901 (section 5227, Burns' Ann. St. 1908). Said section 5158a, (5227), *supra,* has no application to a case like the one before us, where a street or interurban electric railroad crosses the tracks of a steam railroad. Wabash R. Co. *v.* Ft. Wayne, etc., Traction Co., 161 Ind. 295, 310, 67 N. E. 674.

It is evident that the court did not err in its conclusions of law. It follows that the court did not err in overruling appellant's de-

murrer to the traction company's answer to the complaint, nor in overruling appellant's demurrer to the traction company's cross-complaint.

The complaint, the traction company's answer, and its cross-complaint, and appellant's answer to the cross-complaint, were read in evidence under an agreement that "the facts alleged in each of said pleadings were true as therein alleged." Under this agreement only facts properly pleaded could be considered, and all the conclusions of the pleader and mere apprehensions and fears alleged, and all mere recitals, epithets, and surplusage must be disregarded. However, a number of the findings of the court were based solely upon the conclusions, apprehensions, and fears of the pleader, expressed in the pleadings of appellant, and the recitals, epithets, and surplusage alleged in said pleadings, and not upon facts properly pleaded. If there was a conflict in the facts properly alleged in the pleading, such facts should be found against the party having the burden of proof as to such facts or issue. Under this rule we cannot say that the findings of the court, so far as they were against appellant, were not sustained by the evidence, nor that they were contrary to law. As the judgment of the court was in accordance with the conclusions of law, the court did not err in overruling appellant's motion to modify the judgment. Nelson *v.* Cottingham, 152 Ind. 135, 137, 52 N. E. 702; Chicago, etc., R. Co. *v.* State ex rel., 159 Ind. 237, 242, 64 N. E. 860, and cases cited.

Judgment affirmed.

JORDAN and MONTGOMERY, JJ., dissent.

PALMER *v.* PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon, April 26, 1910.)

[108 Pac. Rep. 211.]

Trial—Motion for Nonsuit—Review of Evidence.—The court, on motion for nonsuit, must view the testimony in the light most favorable to plaintiff.

Street Railroads—Operation—Care Required.—More care is essential to the proper operation of street cars than is usually required on the part of steam railroads.

Street Railroads—Operation—Reciprocal Rights.*—The rights of travelers on a street on which street cars are operated, and the right to operate street cars, are reciprocal; and the travelers and the car men must act with due regard for the rights of others, and the public may assume that in the operation of the cars municipal ordinances will be observed.

Street Railroads—Operation—Negligence—Question for Jury.†—Whether the moving of street cars at a greater speed than permitted by a municipal ordinance is negligence is for the jury.

Negligence—"Proximate Cause."‡—"Proximate cause" is defined

*See first foot-note of Carroll *v.* Connecticut Co. (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; fourth head-note of Powers *v.* Des Moines City Ry. Co. (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; second head-note of Hellieson *v.* Seattle Elec. Co. (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; second foot-note of Keefe *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725.

For the authorities in this series on the question whether a person about to attempt to cross railroad tracks has the right to presume that street cars or trains will not approach at unlawful speed, see third paragraph of first foot-note of Grimm *v.* Milwaukee, etc., Co. (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665; third foot-note of Kern *v.* Des Moines City Ry. Co. (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

†See second foot-note of Cleveland, etc., Ry. Co. *v.* Powers (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; last foot-note of Dyson *v.* Southern Ry. Co. (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; second foot-note of Norfolk & P. Traction Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; last foot-note of Wilson *v.* Puget Sound Elec. Ry. Co. (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311; first foot-note of Henry *v.* Cleveland, etc., Ry. Co. (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48; foot-note of Kern *v.* Des Moines City Ry. Co. (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

‡For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see second foot-note of Brown *v.* Chesapeake & O. Ry. Co. (Ky.), 34 R. R. R. 714, 57 Am. & Eng. R. Cas., N. S., 714; second head-note of Craig *v.* Great Northern Ry. Co. (Wash.), 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675; fourth foot-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; last foot-note of St. Louis, etc., Ry. Co. *v.* Pollock (Ark.), 34 R. R. R. 240, 57 Am. & Eng. R. Cas., N. S., 240;

generally as the cause which leads to or may naturally be expected to produce the result.

Street Railroads—Collision—Negligence—Question for Jury.—Whether there was negligence in the operation of a street car which ran into a traveler and injured him held, under the evidence, for the jury.

Street Railroads—Collision—Contributory Negligence—Question for Jury.—Whether a traveler, injured in a collision with a street car while attempting to cross the street in front of the car, was guilty of contributory negligence in failing to look for the approaching car immediately before attempting to cross the track held, under the evidence, for the jury.

Street Railroads—Injuries to Traveler—Contributory Negligence—Burden of Proof.§—The burden of proving contributory negligence of a traveler, struck by a street car while attempting to cross the track in front of an approaching car, is on the street railroad.

Negligence—Proximate Cause—Question for Jury.—Where the proximate cause of an injury is problematical, the case must be submitted to the jury.

Street Railroads—Injuries to Traveler—Negligence—Evidence—City Ordinance.—In an action for injuries to a traveler in a collision with a street car running at an excessive rate of speed, the ordinance fixing the maximum speed and the evidence offered in connection therewith to show the speed limit in the city, are admissible.

Moore, C. J., dissenting.

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by Laura Palmer against the Portland Railway, Light & Power Company. From a judgment of nonsuit at the close of plaintiff's testimony, she appeals. Reversed, and new trial ordered.

This is an action for damages sustained by plaintiff by reason of injuries inflicted in a collision between an electric car, operated on defendant's street railway in the city of Salem, and a single buggy, drawn by one horse, in which plaintiff was riding. The evidence tends to show that, just before the accident, plaintiff and her husband drove down High street to the intersection, with State street, and then turned easterly up State street, with the intention of turning south at Cottage street, a distance, approximately, of

Bloom *v.* Sioux City Traction Co. (Iowa), 33 R. R. R. 784, 56 Am. & Eng. R. Cas., N. S., 784; last foot-note of Cleveland, etc., Ry. Co. *v.* Powers (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; fourth foot-note of Lockwood *v.* Boston Elev. Ry. Co. (Mass.), 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

§See second foot-note of White *v.* New York, etc., R. Co. (Mass.), 31 R. R. R. 488, 54 Am. & Eng. R. Cas., N. S., 488; last foot-note of Fleenor *v.* Oregon Short Line R. Co. (Idaho), 34 R. R. R. 513, 57 Am. & Eng. R. Cas., N. S., 513.

800 feet from High street. When the buggy turned east at High, plaintiff saw defendant's car standing still, about 450 feet west. The buggy was driven at a speed of about nine miles an hour up State street, parallel with the north rail of defendant's track, and about four feet therefrom. Plaintiff's husband was driving, but she was directing his movements and keeping watch for the approach of street cars. There is no evidence showing at what moment, after plaintiff first saw the car, it was put in motion, but she testified that, when the buggy reached Church street, she again looked, and noticed that the car was from a block and a quarter to a block and three-quarters behind the buggy, or between 400 and 600 feet distant. After passing, but near, the center of the next block, she saw that the car was behind them "about" three-quarters of a block, a distance of approximately 250 feet. Proceeding from this point to the intersection of Cottage and State streets, less than half a block, she directed her husband to turn south to Cottage street. She did not at that moment look or listen for the approaching car, nor was the speed of the horse slacked, and when they turned to cross the track they perceived the car within 40 feet of the buggy, running at a great speed, probably 20 miles an hour, at which moment the horse's front feet were on the car track. The driver attempted to swing his horse to the left to avoid the accident, but the car struck the rear of the buggy, shattering it, and throwing plaintiff to the ground and injuring her. The car, as the evidence tends to show, was a penitentiary car, used for conveying convicts to and from their work, and no bell was rung, nor any signal whatsoever given of its approach. Plaintiff testified that she was familiar with the speed and manner in which street cars were usually operated in Salem, and there was other evidence tending to show that the speed attained by the car in question was much greater than usual, and about 20 miles an hour. Plaintiff offered in evidence the ordinance, granting the street railway franchise to defendant's grantor, which provides that cars should not be run at a greater speed than 10 miles an hour, but this evidence was rejected. It was shown that State street is 99 feet wide, that the car track is practically in the center of the street, and that there were no wagons or other vehicles in the vicinity when the accident occurred. At the conclusion of the plaintiff's testimony, the court granted a nonsuit, and she appeals, assigning as error the sustaining of defendant's motion for nonsuit and exclusion of evidence showing defendant to have been operating under an ordinance, limiting the speed of cars within the corporate limits of the city of Salem to 10 miles an hour.

John A. Carson (*Carson & Brown,* on the brief), for appellant.
Franklin T. Griffith (*Geo. G. Bingham,* on the brief), for respondent.

KING, J. (After stating the facts as above). To test the suf-

ficiency of the proof under a motion for nonsuit, the testimony must be viewed in the light most favorable to the plaintiff. Kunz *v.* O. R. & N. Co., 51 Or. 191, 205, 93 Pac. 141, 94 Pac. 504. Some of the witnesses testified to the fact that the car was running about 20 miles an hour. Plaintiff testified that, when opposite the courthouse corner, the car was not less than a block and a quarter, or a distance of about 440 feet to their rear; that after driving to a point near the center of the next block, in front of the post office, she again looked, at which time the car was at least three-fourths of a block distant; that she supposed it was running at the regular rate of speed, the limit of which is fixed by ordinance at 10 miles an hour, and that after looking the last time the buggy was driven to the intersection of Cottage street, or about 150 feet, before attempting to cross the track.

It is too well-settled to admit of serious discussion that more care is essential to the proper operation of street cars than is usually required on the part of steam railways. The rights of travelers upon the streets, whether in vehicles or otherwise, are reciprocal; all must act with due regard for the rights of others. The public has the right to assume that at least the requirements of municipal ordinances will be observed; and the question as to whether the moving of cars at a greater speed than permitted by law constitutes negligence is for the jury. Beck *v.* Vancouver Ry. Co., 25 Or. 32, 34 Pac. 753; Wolf *v.* City Ry. Co., 45 Or. 457, 72 Pac. 329, 78 Pac. 668; Donohoe *v.* Portland Ry. Co., 56 Or. —, 107 Pac. 964. It is held in Donohoe *v.* Portland Ry. Co. that "it must appear that, although the defendant was negligent, the injury was caused by the unlawful speed, without contributory negligence of the person complaining, which was the proximate cause of the injury." But, in this instance, it is manifest that had defendant's car not exceeded the reasonable rate of speed prescribed by ordinance, which plaintiff had a right to assume, no collision would have occurred. As stated in Buswell on Personal Injuries (2d Ed.) § 97, qnoted with approval in Elliff *v.* O. R. & N. Co., 53 Or. 66, 76, 99 Pac. 79: "The proximate cause is to be defined generally as the cause which led to or might naturally be expected to produce the result." Now, applying this rule, let it be remembered that plaintiff had a right to travel upon the street, and near to, or even upon, the track, and to cross the street at any suitable point, especially at a crossing, as attempted on this occasion, and defendant had a like right to be upon its track thereon; each being required to be reasonably prudent in the exercise of their respective privileges. But, as shown, there was ample evidence from which the jury could find that defendant was negligent; and, whether plaintiff was also reckless, and thereby contributed to and was the proximate cause of the collision, depends upon whether she used due diligence in watching the approaching car before attempting to cross the track, or

looked in sufficient time to come within the usual prudential requirements.

After looking, and before attempting to cross the track, plaintiff traveled 150 feet; this distance, according to the effect of the testimony adduced in her behalf, was covered in 10 to 11 seconds. Had the car, during that space of time, not exceeded the maximum rate of speed of 10 miles an hour, it would have traveled approximately 160 feet. When plaintiff last looked the car had about 400 feet to run before it could overtake them; therefore, when they attempted to cross the street, they were entitled to assume that the car was about 240 feet to the rear, thus giving them about 15 seconds in which to cross the track before the possibility of a collision. Hence there was no real necessity to look again, unless it was incumbent upon them to take notice, or to presume that the defendant was violating the ordinance by running at a reckless speed. The evidence does not justify such an assumption, and that a person should so presume is never required. True, many persons, before attempting to cross the track under such circumstances, might have looked again, but whether a failure so to do, when the car could reasonably have been expected to be from 230 to 240 feet distant, with at least 15 seconds in which to drive less than 20 feet (when at the rate they had been driving they could have covered 225 feet), is certainly a matter concerning which reasonable minds may differ, necessitating a submission thereof to the jury.

It also appears that had the car been under proper control, and not going at an unreasonable speed, it could have been stopped in time to prevent a collision; thus supplementing the plaintiff's proof, tending to establish as a question for the consideration of the jury that defendant's negligence was the primary cause of the accident. Donohoe *v.* Portland Ry. Co., 56 Or. —, 107 Pac. 964; Kunz *v.* O. R. & N. Co., 51 Or. 191, 205, 93 Pac. 141, 94 Pac. 504. The burden of proving contributory negligence is on the defendant. Gentskow *v.* Portland Ry. Co., 54 Or. 114, 120, 122, 102 Pac. 614. And, as held in Elliff *v.* O. R. & N. Co., 53 Or. 66, 76, 99 Pac. 76, where the proximate cause of the injury is problematical, as certainly appears here, the case should be submitted to the jury. Or, as said by Mr. Justice Lamar in Grand Trunk Ry. Co. *v.* Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 683, 36 L. Ed. 485: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has

relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." To the same effect, see Hedin *v.* Railway Co., 26 Or. 155, 161, 37 Pac. 540; Hecker *v.* Oregon Railroad Co., 40 Or. 6, 66 Pac. 270; Webb *v.* Heintz, 52 Or. 444, 447, 97 Pac. 753. See, also, Doyle *v.* Southern Pacific Co., 56 Or. —, 108 Pac. 201, and authorities there collated on the subject. To affirm the judgment of the trial court would not only be at variance with the principles enunciated in the foregoing authorities, but manifestly inconsistent with the views announced and adopted in the following additional decisions by this court upon the subject: Galvin *v.* Brown & McCabe, 53 Or. 598, 608, 101 Pac. 671; Crosby *v.* Portland Ry. Co., 53 Or. 496, 502, 100 Pac. 300, 101 Pac. 204; Webb *v.* Heintz, 52 Or. 444, 446, 97 Pac. 753; Wolf *v.* City Ry. Co., 45 Or. 446, 457, 72 Pac. 329, 78 Pac. 668; Geldard *v.* Marshall, 43 Or. 438, 73 Pac. 330; Shobert *v.* May, 40 Or. 68, 66 Pac. 466, 55 L. R. A. 810, 91 Am. St. Rep. 453.

The learned court below erred in excluding the ordinance and proof offered in connection therewith for the purpose of showing the speed limitation prescribed by ordinance within the city, and in sustaining the motion for nonsuit. The judgment will accordingly be reversed, and a new trial ordered.

MOORE, C. J., dissents.

ST. LOUIS & S. F. R. CO. *v.* SHANNON.

(Supreme Court of Oklahoma, March 8, 1910.)

[108 Pac. Rep. 401.]

Railroads—Fires Set by Locomotives—Evidence.*—In an action against a railroad company to recover damages on account of fire caused by sparks from one of its locomotives, evidence of the setting of other fires by other locomotives is competent where it is made to appear that they were practically identical in construction to the one supposed to have set the fire.

Railroads—Fires—Circumstantial Evidence.†—The fact that a fire, which destroyed property, originated from the sparks of a passing locomotive, may be shown by circumstantial evidence.

New Trial—Verdict Contrary to Evidence—Sufficiency of Evidence.—A barn situated about 100 feet north of a railroad track was destroyed by fire, which caught at an opening in hay with which it was filled. An engine, running heavy and throwing sparks or cinders toward the barn, passed just prior to the time of the discovery, and no other cause for the fire is suggested than that it was set from this engine. Fires from sparks from this or other similar engines running on the same track had set fire to grass immediately around the barn on previous recent occasions. Held, that an order overruling a motion for new trial, for that the evidence did not reasonably sustain a verdict against the company, was not error.

(Syllabus by the Court.)

Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by O. L. Shannon against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. A. Kleinschmidt and *R. M. Campbell,* for plaintiff in error.
Hatchett & Ferguson, for defendant in error.

DUNN, C. J. March 24, 1908, defendant in error, as plaintiff, filed his action against plaintiff in error, as defendant, in the district court of Bryan county, Okl., wherein he sought to recover damages occasioned by the destruction of his barn by fire, which he alleges was set by a locomotive engine running and

*See last foot-note of Goodman *v.* Lehigh Valley R. Co. (N. J.), 34 R. R. R. 383, 57 Am. & Eng. R. Cas., N. S., 383; last foot-note of Ides *v.* Boston & M. R. R. (Vt.) 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

†See foot-note of Byers *v.* Baltimore & O. R. Co. (Pa.), 34 R. R. R. 390, 57 Am. & Eng. R. Cas., N. S., 390; second foot-note of Norfolk & W. Ry. Co. *v.* Thomas (Va.), 34 R. R. R. 618, 57 Am. & Eng. R. Cas., N. S., 618.

operated by defendant upon its railroad. A trial was had to a jury, which resulted in a verdict for the plaintiff, on which judgment was entered, and the case has been brought for this court for review.

Two propositions are presented by counsel for plaintiff in error for our consideration: First, that the court erred in permitting defendant in error to introduce evidence showing that other engines of plaintiff in error, prior to the time of the fire in question, were seen to emit sparks and cinders and to set out fires in the vicinity where this fire occurred. Second, that the evidence introduced was not sufficient to sustain the verdict and the judgment. Counsel place most stress upon their first proposition in view of the fact, as is contended, that the engine which was supposed to have set out the fire was identified and known. Counsel for both parties have briefed this question extensively, and an investigation of it disclosed that there is much conflict in the authorities. A most exhaustive and satisfactory note on this proposition is appended to the case of Florida East Coast Ry. Co. *v.* Welch (53 Fla. 145, 44 South. 250) 12 Am. & Eng. Ann. Cas. 210. Herein are collated the authorities from every jurisdiction in the United States, and, without a review thereof, we will say that it would seem that the weight of authority is to the effect that, where the engine which is alleged to have set out the fire is identified, then evidence of other fires by other engines and at other times is inadmissible. This states the general rule on the proposition, yet there are exceptions to it within which in our judgment the facts disclosed by this record cause this case to fall, and which relieve us of passing on it. The rule fixed by the exceptions seems to be that where the defense relied upon by the company is that the point at which the fire is set is beyond the limit locomotives of the company throw cinders or fire, or where it is established that the engines of the company are all practically identical in their construction and operation, then it is permissible, independent of the identification of the engine which it is asserted actually set the fire, to show that other fires, not too remote in point of time, have been set by other engines of the company. Dunning *v.* Maine Central R. R. Co., 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; Big River Lead Co. *v.* St. Louis, Iron Mountain & So. R. R. Co., 123 Mo. App. 394, 101 S. W. 636; Campbell *v.* Missouri Pacific R. Co., 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Matthews *v.* Missouri Pacific R. Co., 142 Mo. 645, 44 S. W. 802; Black *v.* Minneapolis & St. L. R. Co., 122 Iowa, 32, 96 N. W. 894; Chesapeake & O. R. Co. *v.* Richardson (Ky.) 99 S. W. 642; Louisville & Nashville R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936; Louisville & Nashville R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429; Sheldon *v.* Hudson River R. R. Co., 14 N. Y. 218, 67 Am. Dec. 155.

Witnesses for the defendant testify that engine No. 601, which was switching in the yards at the time of the fire, had been inspected shortly prior to that time, and that it was in good condition; that the fire-netting was perfect, and the netting to prevent the emission of sparks was the standard size without holes or defects; that this inspection was made both the day before the fire and also the day afterward; that the mesh made by the spark arrester was 3 to the inch; and that the sparks or cinders traveled a distance of 13 to 14 feet diagonally before they turned up to leave the smoke stack. The engineer testified that he had never seen fire set to a house or anything except the right of way, and another witness testified that the defendant company keeps its engines up to the very highest standard; that the other engines were subjected to the same inspection and kept up to the same high standard as nearly as could be, as engine No. 601, and that it was no better than any of the rest.

In the case of Dunning *v.* Maine Central Railroad Co., *supra*, the counsel for plaintiff contended that the locomotive which drew the Dover & Dexter train was the one which set the fire. Evidence was offered showing that other engines of the defendant corporation had set fires in that vicinity and had emitted sparks and cinders. On the admissibility of this evidence the Supreme Judicial Court of Maine said: "That other engines of the same company, under the same general management, passing over the same track at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. Such testimony is illustrative of the character of the locomotive, as such, with respect to the emission of sparks or the dropping of coals." The same question was raised in the case of Big River Lead Company *v.* St. Louis, Iron Mountain & Southern R. R. Co., *supra*, and in discussing its admissibility the St. Louis Court of Appeals said: "The reason for admitting such evidence was stated in Sheldon *v.* Railroad, 14 N. Y. 223 [67 Am. Dec. 155]. * * * The reason is that there is usually a uniformity of plan and construction in locomotives used by a railway company, so that, if some of them emit cinders, presumably the others do. If they differ in construction, and some are less likely to throw out fire than others the company can prove these facts." And the Supreme Court of the state of Missouri has gone to yet a further extreme on this same proposition in its holding in the case of Matthews *v.* Missouri Pacific Railway Company, *supra*, wherein it is said: "In a suit under section 2615, Rev. St. 1889, against a railroad for destroying a barn by fire, a witness was permitted to testify to having seen, subsequently to the fire, a spark from an engine strike the center pole of a tent which had been erected on the

site of the barn. It was not shown that the engine was of the same kind or in the same condition as the one from which it was alleged the fire originated, nor that the condition of the weather nor the direction of the wind was the same. Held, that the evidence was competent as tending to prove the possibility, and consequent probability, that the fire was communicated to the barn by one of the railroad's engines." The Supreme Court of Iowa, in the case of Black *v.* Minneapolis & St. Louis R. R. Co., 122 Iowa, 32, 96 N. W. 984, said, with reference to testimony relating to other engines than the one which was supposed to have emitted the sparks which set out the fire, that, "as there was evidence that all the engines were in substantially the same condition, this testimony was admissible." To the same effect is the holding of the Court of Appeals of Kentucky in the case of Chesapeake & Ohio Railroad Co. *v.* Richardson, *supra,* wherein evidence was admitted of fire and cinders being thrown out by other engines than the one which was charged with having set the fire in that case; the court saying: "It is settled that as the engines are all under one management, and the same kind of screens are used in all, proof is admissible of cinders thrown out by other engines, or fires set by them about the same time." The Supreme Court of Tennessee, in the case of Louisville & Nashville Railroad Co. *v.* Short, *supra,* held on this question that: "In an action against a railroad for fire caused by sparks from one of defendant's locomotives, evidence of the setting of other fires by other locomotives is competent; it appearing that the other locomotives were of similar construction to the one in question."

On the second proposition urged by counsel for defendant, we are asked to reverse the case for want of sufficient evidence to sustain the verdict. The testimony of the train operators, especially the engineer, was to the effect that, at the time of the arrival of the engine in the vicinity of the barn, the grass in the immediate neighborhood was burning. Witnesses on the part of plaintiff, however, testified that the train was switching in the neighborhood of the barn before the fire was discovered, and there is a total absence of any evidence upon which to found a conjecture that the fire was due to any other cause than the one claimed. The barn was filled with baled hay, with an opening in the east side, and was located less than 100 feet north of the railroad track. A wind was blowing toward it. An engine of the company, running heavy and throwing cinders, passed it prior to the time when the fire was discovered. The fire caught in this hay. Other fires at other times had been set in the grass which surrounded this barn by sparks from other engines, if not from this one, of the company. With these facts before the jury, we are not able to reverse the case on account of a want evidence reasonably tending to sustain the verdict. The Supreme Court of Kansas, in the case of Kansas City, Ft. S. & M. R. R.

Co. *v.* B. F. Blaker & Co., 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Am. & Eng. Ann. Cas. 883, discussing the same question in that case as is before us in this one, said: "It is contended that the evidence of negligence of the railroad company in setting out the fire was insufficient, and that some of that received was incompetent. It was mainly circumstantial, but we deem it to have been sufficient to support the verdict. A heavy freight train passed the buildings destroyed shortly before the fire was discovered. It was running rapidly, working steam, and leaving a trail of smoke behind it. Within a few minutes after it passed, persons in the neighborhood saw a patch of fire on the roof of the elevator. No fire was kept in the elevator at the time. It had been locked up for two weeks before the fire occurred. The wind was blowing from the railroad track toward the elevator. As far as the testimony goes, no one saw sparks proceeding from the engine and lighting on the building, but there was nothing in the testimony to show that the fire could have arisen from any other source, and the facts recited, in the absence of proof of any other cause, tend to show that the fire was caused by the sparks from the engine, and whether the fire so originated was a proper question for the jury. The effect of circumstantial evidence of this character was before the court in the recent case of Kansas City, etc., R. Co. *v.* Perry, 65 Kan. 792, 70 Pac. 876. After a full consideration and a review of the authorities, it was there held: 'The fact that soon after the passing of an engine a fire starts near a railway track in an inclosed field, covered at the time with a growth of highly inflammable vegetation, and travels before a high wind in a direction away from the track, is sufficient to warrant a jury in finding that the fire was caused by the operation of the railroad, without its appearing that the engine emitted sparks or live cinders or was put to special exertion, and without further proof, excluding other possible origins.'"

We have carefully read the record made at the trial, as well as counsels' briefs, and, from a consideration of the whole matter, we are unable to come to the conclusion that error was committed, and the judgment is, accordingly, affirmed.

TURNER, KANE, HAYES, and WILLIAMS, JJ., concur.

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err., *v.* STATE OF NEBRASKA. MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err., *v.* STATE OF NEBRASKA *ex rel.* FARMERS' ELEVATOR COMPANY OF STRAUSVILLE, NEBRASKA.

(Argued March 7, 1910. Decided April 4, 1910.)

[30 Sup. Ct. Rep. 461.]

Constitutional Law—Due Process of Law—Compulsory Construction of Side Track or Switch.*—The compulsory construction and maintenance by a railway company, under Neb. Sess. Laws 1905, chap. 105, §§ 1, 6, at its own expense, and without a preliminary hearing, under penalty of a heavy fine for refusal, of the side tracks or switches necessary to reach grain elevators which may be erected adjacent to the right of way, cannot be justified as an exercise of the police power, but such statute takes the property of the railway company without due process of law, even if construed as operating only when the demand for such facilities is reasonable.

In error to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Cass County, in that state, imposing a fine on a railway company for its refusal to construct and maintain, at its own expense, the side track or switch necessary to search a grain elevator erected adjacent to its right of way. Reversed. Also in error to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Richardson County, in that state, granting a mandamus compelling a railway company to construct such switch or side track. Reversed.

See same case below, No. 127, 81 Neb. 15, 115 N. W. 614; No. 128, 81 Neb. 174, 115 N. W. 757.

The facts are stated in the opinion.

Messrs. *Balie P. Waggener* and *James W. Orr,* for plaintiff in error.

Messrs. *William T. Thompson* and *Grant G. Martin,* for defendant in error in No. 127.

Messrs. *R. C. James, Norris Brown,* and *C. Gillespie,* for defendant in error in No. 128.

*See foot-note of Southern Ry. Co. *v.* Attorney General (Miss.), 33 R. R. R. 52, 56 Am. & Eng. R. Cas., N. S., 52; St. Louis, etc., Ry. Co. *v.* Wynne (Ark.), 33 R. R. R. 459, 56 Am. & Eng. R. Cas., N. S., 459; foot-note of Tracy *v.* New York, etc., R. Co. (Conn.), 34 R. R. R. 105, 57 Am. & Eng. R. Cas., N. S., 105; foot-note of St. Louis, etc., R. Co. *v.* McNamare (Ark.), 33 R. R. R. 713, 56 Am. & Eng. R. Cas., N. S., 713; first head-note of National Car Ad. Co. *v.* Louisville, etc., R. Co. (Va.), 33 R. R. R. 179, 56 Am. & Eng. R. Cas., N. S., 179.

Missouri Pac. Ry. Co. *v.* Nebraska

Mr. Justice HOLMES delivered the opinion of the court:

These are two suits arising under a Nebraska statute. The first is brought by the state to recover a fine of $500 imposed by the law for failure to obey its command; the second is brought at the relation of the party concerned, to compel obedience to the same command by mandamus. The statute in question provides that "every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating, grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near as 4 feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants, adjacent to their right of way, for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than 15,000 bushels." Then follows a section making railroads liable for damages in case of willful violation of the act (which contains other provisions beside the above), and imposes the above-mentioned fine for each offense. Session Laws of 1905, chap. 105, §§ 1, 6; 2 Cobbey's Supp. § 10,007, p. 410.

Under this act the Manley Co-operative Grain Association, a corporation, applied in writing for a site for an elevator on the right of way of the plaintiff in error, in Manley, Nebraska, but the application was refused. Then notice was sent that the corporation intended to build near the end of a side track at the railroad station at Manley, and would expect an extension of the side track. The railroad company replied that it would give no trackage privilege. The elevator was built and a demand was made for a side track, repeating a previous offer to bear a fair share of the expense of the extension. This also was refused, and thereupon the first-mentioned suit was brought for the penalty imposed by the act. The other suit is a petition for mandamus at the relation of the Farmers' Elevator Company of Strausville, Nebraska, another elevator corporation, and the facts are so like the foregoing that they do not need special statement. In both cases the railroad company set up that the statute was an attempt to regulate commerce among the states, and also was

void under the 14th Amendment. After trials, the fine was imposed and the peremptory writ of mandamus was ordered, and both judgments were affirmed by the supreme court of the state. 81 Neb. 15, 174, 115 N. W. 614, 757.

It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be $450 in one and $1,732 in the other, and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. Woodward *v.* Central Vermont Ry. Co. 180 Mass. 599, 602, 603, 62 N. E. 1051. Moreover, a part of the company's roadbed is appropriated mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator. Now it is true that railroads can be required to fulfil the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. Missouri P. R. Co. *v.* Kansas, Feb. 21, 1910. [216 U. S. 262, ante 330, 30 Sup. Ct. Rep. 330.] It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government,—the power commonly called the police power. But railroads, after all, are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away.

Thus, it is at least open to question whether a railroad company could be required to deliver cattle at another than its own stock yard at the end of the transit, or cars elsewhere than at its own terminus, without extra charge, if it furnished reasonable accommodations. Louisville & N. R. Co. *v.* Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246; Central Stock Yards Co. *v.* Louisville & N. R. Co. 192 U. S. 568, 570, 48 L. ed. 565, 569, 24 Sup. Ct. Rep. 339; Covington Stock Yards Co. *v.* Keith 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. So far as we see, a grain elevator stands in no stronger position than a stock yard. If, as intimated, the elevators with which the Missouri Pacific connects charge too much and wrong the farmers, there may be other remedies; but manifestly the apprehension expressed by the supreme court of Nebraska, that the company, unless checked, will have power to establish a monopoly, is not to be met merely by building another elevator,—the physical limits of that kind of competition are too easily reached. But if we assume that circumstances

might make it reasonable to compel a railroad to deliver and receive grain elsewhere than at its own elevators, or those that it had made its own by contract, the circumstances must be exceptional when it would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the road.

This statute has no reference to special circumstances. It is universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs, and, possibly, without regard to place. It is true that in the first of the present cases the supreme court of Nebraska discussed the circumstances, and expressed the opinion that the demand was reasonable, and that building the side track would not cast an undue burden upon the road; and, in the second, it somewhat less definitely indicated a similar opinion. So it may be, although it hardly seems possible, that the sweeping words of the statute would be construed as, by implication, confining their requirements to reasonable demands. On the face of it, the statute seems to require the railroad to pay for side tracks, whether reasonable or not,—or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly, no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power.

But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. Why should the railroads pay for what, after all, are private connections? We see no reason. And, morever, even on this strained construction, they refrain from paying at the peril of a fine, if they turn out wrong in their guess that, in the particular case, the court will hold the demand not authorized by the act. If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act. Sometimes when summary action is necessary, the property owner's rights are preserved by leaving all questions open in a subsequent suit. North American Cold Storage Co. *v.* Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101. But in such cases the risk is thrown on the destroyer of property. In this case, there is no emergency, yet, at the best, the owner of the property, if it has any remedy at all, acts at its risk, not merely of being compelled to pay both the expense of building and the costs of suit, but also of incurring a fine of at least $500 for its offense in awaiting the result of a hearing. See Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 23

L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702. An earlier statute authorizing the state board of transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed, already has been held bad. Missouri P. R. Co. *v.* Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. See also Hartford F. Ins. Co. *v.* Chicago, M. & St. P. R. Co. 175 U. S. 91, 99, 44 L. ed. 84, 88, 20 Sup. Ct. Rep. 33. We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation, which is said to have been passed in 1907. See Laws of 1907, chap. 89, p. 309.

Judgments reversed.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissent.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plff. in Err., *v.* STATE OF ARKANSAS.

(Argued January 26, 27, 1910. Decided April 4, 1910.)

[30 Sup. Ct. Rep. 476.]

Courts—Error to State Court—Federal Question—Decision on Non-Federal Ground.—The ruling of a state court that the power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the Federal Constitution, does not eliminate the Federal questions from the case, so as to require the dismissal of a writ of error from the Federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings.

Commerce—State Regulation—Carrier's Duty to Furnish Cars.*—Interstate commerce is unconstitutionally regulated by Kirby's Ark. Dig., §§ 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the

*For the authorities in this series on the subject of state regulation of or interference with interstate commerce, see second foot-note of Hockfield *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 492, 57 Am. & Eng. R. Cas., N. S., 492; first foot-note of Hoxie *v.* New York, etc., R. Co. (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537.

purpose of moving interstate commerce because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute.

In error to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Circuit Court of Arkansas County, in that state, imposing a penalty on a railroad company for its refusal to furnish cars to a shipper on demand. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. Roy F. Britton, Nicholas J. Gantt, Jr., William T. Wooldridge, Frank G. Bridges, and *Samuel H. West* for plaintiff in error.

Messrs. Hal L. Norwood, F. E. Brown, and *Pettit & Pettit* for defendant in error.

Mr. Justice White delivered the opinion of the court:

Prior to October, 1905, the railroad commission of Arkansas promulgated a rule by which, within five days after written application by a shipper, it was made the duty of a railway company, under the conditions prescribed in the rule, to deliver freight cars to such shipper, for the purpose of enabling him to load freight. The rule in question, known as order No. 305, is in the margin.†

†It is ordered by the commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock a. m. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of $1 per car per day, dating from 7 o'clock a. m. after the car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock a. m. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor; and whenever such shipments have been so received by any railroad company, they must be carried forward at the rate of not less than 50 miles per day of twenty-four hours, computing from 7 o'clock a. m. the second day following the receipt of shipment.

Complaint was made by Philip Reinsch before the commission, charging the St. Louis Southwestern Railway Company with having violated this rule, in that it was fifty-one freight cars short in complying with written applications made at various times in October, November, and December, 1905, and January, 1906, for the delivery at a station called Stuttgart, of a much larger number of freight cars. The commission found that the railway company was short in the delivery of cars, as alleged, and that its failures in that respect not only violated order No. 305, previously referred to, but also § 10 of an act of March 11, 1899, embodied in Kirby's Digest as § 6803. It also declared that by these violations of the statute and rule of the commission the railway company had become subject to penalties in favor of the state of Arkansas, as provided in § 18 of the act of 1899, being § 6813 of Kirby's Digest, which penalties were to be enforced as therein provided. Conformably to the section in question, the prosecuting attorney for the proper county commenced this action in the name of the state against the railway company, to recover penalties to the amount of $1,950. Rule No. 305 of the commission was recited, the proceedings before the commission were detailed, and the order made by the commission, finding the defaults on the part of the railway company, was set out, and upon these considerations the prayer for the statutory penalty was based.

A demurrer having been overruled, an answer was filed on behalf of the railway company. By that answer it was alleged that the company was engaged in the transportation of interstate shipments of freight over its line of railroad in the states of Arkansas, Illinois, Louisiana, and Missouri, and that its equipment of freight cars for the transaction of its business, both interstate and state, was ample. That, anticipating the possible increase of business, both interstate and state, and as a precautionary measure, the company had, prior to the autumn of 1905, endeavored to contract for the construction of a large number of additional freight cars, but failed to do so, because

Provided, that in computing the time of freight in transit there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or rehandling freight is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in this rule, and counted as additional free time.

The commission reserves the right, on its own motion, to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the commission will, upon complaint, hear and act upon application for a like suspension.

Nothing in these rules shall apply to shipment of live stock and perishable freight where the rules of this commission or the laws of the state require the more prompt furnishing of cars or movement of freight than provided for by these rules.

the car manufacturers had such a press of work that they were unable to take the order. That thereupon, in an effort to provide for every future contingency, the corporation had, at a very large expense, commenced the construction of a plant of large capacity to enable it to manufacture its own cars, and was pressing the same to completion in the shortest possible time. It was alleged that at the time of the alleged defaults there was an extraordinary demand for cars, both for the movement of interstate and local traffic; and when, as the result of this condition, the shortage developed, the company had equally distributed its cars to the shippers along its line, giving no preference to interstate over local shippers, or to local over those desiring cars for interstate shipments. It was alleged that it would have been impossible for the company to comply with rule No. 305 without discriminating against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce. Referring to the interstate commerce business of the company, which it was alleged moved over its own line through the states of Arkansas, Illinois, Louisiana, and Missouri, and thence by connecting roads throughout the United States and Canada, it was charged the burden imposed upon the company to deliver cars to local shippers without reference to the effect and operation of such delivery upon the interstate commerce business of the company would be a direct burden upon interstate commerce, and therefore repugnant to the Constitution of the United States, and that the same result would flow from enforcing the command of the commission as embodied in its rule No. 305. The rule, moreover, was especially assailed as being repugnant not only to the commerce clause, but to the 14th Amendment, both because of the inherent nature of the duty which the rule sought to impose, and also because of the unreasonable conditions which were expressed therein.

There was a trial to a jury. Without going into detail it suffices to say that specific instructions were asked, in reiterated form, by the defendant company, concerning its asserted defences under the Constitution of the United States; that is, the repugnancy to the Constitution of the rule of the commission and of the statute imposing penalties upon it for its failure to furnish cars. After verdict against the company for $1,350, and judgment thereon, the cause was taken to the supreme court of the state of Arkansas, and from the action of that court in affirming the judgment (85 Ark. 311,—L. R. A. (N. S.) —, 122 Am. St. Rep. 33, 107 S. W. 1180) this writ of error is prosecuted.

The question for decision will be simplified by analyzing the action of the court below,—that is, by stating the facts which it deemed were established, and by precisely fixing the issues

and principles governing the same which the court stated and applied. Clearing the way to consider the proposition which it conceived the case involved in its fundamental aspect, the supreme court of Arkansas at once disposed of the contention that the commission was without power to adopt rule No. 305 by the statement that the power to do so was expressly conferred by statutes of the state. The court did not pass on the contentions concerning the alleged conflict between the rule and the Constitution of the United States, because it was expressly declared that it was not at all necessary to do so. This was based upon the conclusion that the duty to furnish the cars which had been demanded arose from statutory provisions (Kirby's Dig. §§ 6803, 6804) which were but expressive of the common law, and that the liability for the penalty which was imposed by the judgment below equally resulted, considering the default as alone arising from violations of the statutory duty.

The statutory duty to supply cars on application having been thus ascertained, and the failure of the company to furnish after demand not being disputed, the court was brought to consider what it declared to be the only question in the case; that is, "Whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars." In so far as adequate excuse could arise from the complete discharge by the company of the duty to equip its road with a sufficient number of cars, it was recognized that the proof was ample; indeed, the court said:

"In fact, the appellant was shown to have a larger car equipment than the average freight-carrying road, and the failure to furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line."

Coming, then, to state the facts concerning the cause which the court expressly found was wholly responsible for the failure to deliver all the cars asked for, it was pointed out:

"The appellant is an originating line, originating about 70 per cent of its traffic and receiving about 30 per cent. To illustrate its situation, during the month of November, 1905, it had in revenue service 9,517 cars, of which it averaged daily 3,982 in use on its own lines, 5,525 off its line, and 2,519 foreign cars in use. In other words, a daily balance of exchange of 1,473 cars was against it, and its shortage in cars was only about 650 per day."

Directing attention to the fact that the preponderant originating business of the road led to a preponderance of interstate over domestic or local traffic, and that such interstate traffic would be greatly impeded, if not paralyzed, by breaking bulk at the state line and refusing to give continuous transportation,

by not allowing its cars, when loaded, to move beyond its line to the roads of connecting carriers, the court was brought to consider whether thus permitting the cars to move for the purpose of continuous interstate commerce traffic was, in and of itself, a fault entailing legal responsibility under the statute for a refusal to deliver cars for local traffic when requested. In holding the negative of this proposition the court said:

"The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars, and not to refuse to send cars off the line. * * * It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public requirements. It is unquestionably the policy of both state and Federal legislation to facilitate, if not require, an interchange of cars. The most recent illustration of this policy is found in § 17 of the act of April 19, 1907 (Acts 1907, p. 463). For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruit to the North and their lumber and coal to the four quarters of the Union, without change from consignor to consignee."

Thus deciding that the mere delivery of cars for through transportation was not a factor in determining whether there was legal fault, the court came to consider whether there was anything in the arrangement by which the cars in question were permitted to go off the line, which in and of itself constituted fault and consequent responsibility for failure to furnish all the cars required in time of shortage. Reviewing the evidence on this subject, it was found that the company was a member of an association known as the American Railway Association, which had adopted rules governing the interchange of cars from one road to another, with provisions for the return thereof and for compensation therefor, the association embracing and its rules governing 90 per cent of the railroads of the United States. Fixing thus the system which controlled the company in the interchange of its cars, it was determined that the mere formation of an association for such purpose was not repugnant to the laws against combinations in restraint of trade, the court, after referring to various state decisions to that effect, saying:

"The result of these and other decisions, as summed up in an excellent text-book, is that these associations are lawful, and their rules and regulations, when reasonable, will be upheld. 2 Hutchinson, Carr. 3d ed. § 861. Mr. Elliott says that such associations formed for the purpose of making and enforcing rea-

sonable regulations to facilitate business and secure the prompt loading, unloading, and return of cars, cannot be held illegal, upon the ground that the constituent companies, by becoming members, surrender their corporate functions and control to the association. 4 Elliott, Railroads, § 1568."

Having thus sustained the right of the road to deliver its cars for the purpose of continuous transportation beyond its line in interstate commerce, and sanctioned the general method by which it was sought to regulate and control the transmission and return of such cars, that is, by membership in the American Railway Association, the nature and character of the rules of the association were considered. Without going into detail, or following the statements of the court on the subject, it suffices to say that, analyzing the rules of the association, the court concluded that the regulations were inefficient in many respects, did not provide sufficient penalties to secure the prompt return of cars by roads which might receive the same, but, on the contrary, afforded a temptation in time of car shortage, inducing a road having the cars of another road to retain and use them, paying the penalty, as to do so would afford it an advantage. Pointing out that the general result of the operation of the rules of the American Railway Association for the interchange of cars had proven ineffective in the past, it was held that the company was at fault for delivering its cars to other roads for the movement of interstate commerce subject to the regulations of the American Railway Association, and therefore the penalty imposed in the judgment was rightly assessed.

As the penalty, which the court sustained, was enforced solely because of its conclusion as to the inefficiency of the rules and regulations of the American Railway Association, which governed 90 per cent of the railroads in the United States, the court was evidently not unmindful that the carrier before it was powerless, of its own motion, to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute provided for. We say this, since the court said: "It may be better for the appellant to suffer these ills than to sail under a black flag, and refuse to send its cars beyond its line. That is not a question for the court. Until the appellant carrier shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred." And the gravity of the ban on interstate commerce which it was thus recognized would result from the ruling made cannot be more

vividly portrayed than by once again quoting the statement of the court on the subject, saying: "For one railroad company to be an Ishmaelite among its associates would be disastrous to its shippers." If the railroad company, compelled to be a law unto itself because of its inability to change, by its own isolated will, the rules of the American Railway Association, should prefer to subject itself to the penalties inflicted by the state statute rather than bring disaster to its shippers, the seriousness of the burden to which interstate commerce would be subjected cannot be better illustrated than by saying that, by the provisions of the state statute, the penalty upon the carrier for each violation of the act or of the rules and regulations of the commission was not less than five hundred nor more than three thousand dollars.

When, by thus following the careful analysis made by the court below, the contentions which the case present are circumscribed and the issues to which all the controversies are reducible are accurately defined, we think no serious difficulty is involved in their solution. In the first place, it is suggested by the defendant in error that no Federal question arises for decision, and therefore the writ of error should be dismissed. This rests upon the theory that, as the court below put the rule of the commission, No. 305, out of view, and declared in its statement of the case that no extraordinary or unusual rush of business on the line of the defendant company occasioned the car shortage therefore no ground of Federal cognizance remained; as, in other respects, the action of the court below was, in effect, placed purely upon matters of local concern broad enough to sustain its judgment. The contention is plainly without merit. It is to be conceded that the ruling of the court as to the irrelevancy of the rule adopted by the commission eliminates from consideration so much of the answer and of the instructions asked by the company and refused, relating to the repugnancy of the order to the commerce clause of the Constitution, both on account of its inherent operation and because of unreasonable provisions, which, it was alleged, it contained. But the constitutional defenses which were asserted by the answer, and which were embraced in the instructions asked and refused, were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the answer. And the ruling of the court, that the asserted power arose from the statute instead of from the rule adopted by the commission, but changed the form without in any way minimizing or obscuring the completeness of the Federal defense which was made in the pleading and necessarily passed upon by the court below.

Coming to the merits, we think it needs but statement to

demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. It is to be observed that there is no question here of a regulation of a state forbidding an unequal distribution of cars by a carrier for the benefit of interstate to the detriment of local commerce. This is the clear result of the finding below as to the proportion of the originating traffic of the road, and the extent of the cars retained and those permitted to go beyond the line of the road for the purposes of interstate commerce. If it be that the court below was right in its assumption that the rules of the American Railway Association, governing, as was conceded by the court, 90 per cent of the railroads, and hence a vast proportion of the interstate commerce of the country, are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency, we think, was primarily vested in the body upon whom Congress has conferred authority in that regard.

The judgment of the Supreme Court of the State of Arkansas is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

MR. CHIEF JUSTICE FULLER dissents.

CHARLES A. DAVIS, Executor of the Estate of Frank E. Jandt, Deceased, Plff. in Err., *v.* CLEVELAND, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY *et al.*

[30 Sup. Ct. Rep. 463.]

Courts—Error to Circuit Court—Sufficiency of Certificate of Jurisdiction.—Formal defects in the certificate as to jurisdiction filed by a Federal circuit court under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, for the purpose of sustaining a writ of error from the Federal Supreme Court, are not material, where the record clearly shows that the only matter tried and decided in the circuit was one of jurisdiction.

Courts—Error to Circuit Court—Jurisdiction Below.—The jurisdiction of a Federal circuit court as a Federal court is so involved as to sustain a direct writ of error from the Federal Supreme Court under the act of March 3, 1891, § 5, in a judgment dismissing the suit on the gound of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant.

Appearance—General or Special—Motion to Quash Attachment and Garnishment.—A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a Federal circuit court for the sole purpose of moving to quash the service of writs of attachment and garnishment upon its property in the district, on the ground that such property was not subject to attachment or garnishment.

Commerce—Attachment of Railway Cars.*—Cars owned by a foreign railway company, which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the interstate commerce act and of U. S. Rev. Stat., § 5258, U. S. Comp. Stat. 1901, p. 3564, securing continuity of transportation.

Commerce—Garnishment of Freight Due Nonresident Carrier.†—Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments may be garnished

*For the authorities in this series on the subject of the attachment of railroad property, see foot-note of Missouri Pac. Ry. Co. *v.* Kennett (Kan.), 33 R. R. R. 156, 56 Am. & Eng. R. Cas., N. S., 156.

†For the authorities in this series on the subject of the right to garnishee railroad companies or their agents, see foot-note of Johnson *v.* Union Pac. R. Co. (R. I.), 28 R. R. R. 538, 51 Am. & Eng. R. Cas., N. S., 537.

For the authorities in this series on the subject of state regulation of, or interference with, interstate commerce, see foot-note of preceding case.

under the state laws, despite the provisions of the interstate commerce act and of U. S. Rev. Stat., § 5258, U. S. Comp. Stat. 1901, p. 3564, securing continuity of transportation.

In error to the Circuit Court of the United States for the Northern District of Iowa, dismissing, for want of jurisdiction over person or property, a suit against a foreign railway company in which writs of attachment and garnishment were issued and levied upon cars belonging to such company in the possession of other carriers, and sums of money due from such other carriers as the defendant carrier's share of the freight on interstate shipments. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. *Wilbur Owen* and *Elbert H. Hubbard* for plaintiff in error.

Messrs. *William H. Farnsworth, Frank L. Littleton,* and *Shull, Farnsworth, & Sammis* for defendants in error.

Mr. Justice McKENNA delivered the opinion of the court:

This case presents a question of jurisdiction arising from the levy in attachment proceedings on freight cars alleged to have been engaged, when attached, in interstate commerce. The case is here on certificate.

Plaintiff in error, as executor of the estate of Frank E. Jandt, brought an action against the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company for causing the death of Jandt, a statute of Illinois giving such an action to the personal representative of a person whose death has been caused by "wrongful act, neglect, or default." The cause of action arose in Illinois. The action was brought, however, in the district court of Woodbury county, state of Iowa, and under the laws of the latter state writs of attachment and garnishment were issued and levied upon certain cars of the C. C. C. & St. L. Ry. Co. in the possession of the other defendants in error, referred to hereafter as the garnishee companies. Notice of garnishment was duly served on the garnishee companies, and each of them filed answers. Plaintiff in the action, and we will so refer to him, controverted by proper pleadings the answers, and demanded that evidence be taken on the issues joined.

The original notice was served on the C. C. C. & St. L. Ry. Co., at its principal place of business in the state of Ohio; also notice of attachment and garnishment. It filed a petition for removal of the action to the circuit court of the United States for the northern district of Iowa, western division. Its petition alleged that it was a corporation duly formed and organized under the laws of Indiana, and that the plaintiff was a citizen of Iowa. The petition was granted and the case duly removed

to the circuit court of the United States. On the second of October, 1905, the C. C. C. & St. L. Ry. Co. filed a motion, which was denominated a motion to quash and set aside service, in which it stated that it appeared specially for the purpose of the motion only, "to quash and set aside the service of attachment and garnishment attempted to be made in the cause by plaintiff against the defendant's property." The motion was supported by an affidavit. The affidavit stated that the company was incorporated under the laws of Indiana and Ohio, and conducted and operated lines of railway in those states and in Illinois, with its principal place of business in Cincinnati, Ohio; that it was not incorporated in Iowa, and had no agent or agency of any character in that state; that it was a common carrier of freight and passengers, and in the carrying on of such business it owned and operated cars for the transportation of freight and merchandise through the various states; that in the conduct of such business it had arrangements, contracts, and agreements with various connecting railroad companies doing business as common carriers, including all of the railway companies attached and garnisheed in the action by plaintiff, under which those companies accepted from it, at points on its line of road, its cars loaded with goods and merchandise destined for various points on their respective lines, to be transported through the various states to destinations, constituting interstate shipments of commerce. It was stated that it was provided in the agreement that such connecting carriers should have the right to reload the cars received by them, and so use the same in returning them to the place where received, and that in all cases the cars of the company were to be returned to it in the usual and ordinary course of transit as soon as the nature and character of the business would permit. It was further stated that, under the laws of Congress, the company was bound to furnish cars so loaded, to be transported continuously from one state to another without being unloaded, and that, under the same laws, connecting carriers were bound to receive the same and transport them from one state to another. That, in pursuance of the agreements and laws of Congress, the cars attached were delivered by the C. C. C. & St. L. Ry. Co. to the other companies, and so received by them; that the cars were part of the company's rolling stock, and were necessary to enable it to perform its duties as a common carrier; that by reason of the commerce clause of the national Constitution and of the interstate commerce act the cars could not be levied upon; that the company had not been served personally or by publication, and had not appeared to the action or any writ issued in the cause. It was further stated that none of the garnishee companies was indebted to the company, and that any accounts which might be due from the garnisheed companies were only by reason of the contracts and

agreements for the use of the cars, as heretofore stated, under which the permits for the use of the cars were arranged between the companies "by wheelage or mileage of such cars, and were constantly and hourly changed from bills due one company to bills due the other company, which bills were satisfied and settled by such exchange of service and use of each other's cars. And such agreements and contracts are to be discharged, satisfied, and settled only in the city of Chicago and state of Illinois, where the same are made, and such accounts, or debts, if any, in favor of this defendant, have no situs in the state of Iowa." The affidavit was supplemented by two others.

Plaintiff filed a "resistance" to the motion to quash and to the motion of the garnishee companies, and alleged that a special appearance was "unwarranted and unauthorized by law;" and that, as the purpose sought by the motion of the defendant company could only be had by a general appearance, the special appearance should be construed to be such, and subject the "person of the defendant as well as the property actually attached, and the property and money of the defendant sought to be reached by garnishment proceedings, to the jurisdiction of the court." The ground of this conclusion was stated, with some reception to be that the special appearance was not for the purpose of raising any question of lack of notice, or notice of defect or irregularity of process, but to contest the right to attach property by evidence outside the record of the case, and required the court to pass upon the merits of the attachment. Plaintiff denied that the property attached was engaged in interstate commerce or in the transportation of interstate commerce at the time they were attached, that they were not in use at the time they were attached, but were standing empty upon the tracks of the railway companies in whose possession they were found, and denied the existence of the agreements and arrangements between the C. C. C. & St. L. Ry. Co. and the other companies in regard to the cars, and that no contractual rules existed between them; that the cars were not necessary, either to that company or to the other companies, to enable them perform their duties as common carriers, and alleged that they were subject to attachment as other personal property. It was stated that the garnishee companies had no interest in the attached cars, and none of them had served notice of interest or ownership on the plaintiff nor on the sheriff.

The answers of five of the garnishee companies denied indebtedness to the C. C. C. & St. L. Ry. Co., averred the existence of agreements as to the cars, substantially as set out by that defendant, also their duties as common carriers under the acts of Congress, and that the cars were in their possession in pursuance of the agreements with the defendant, and were to be returned

empty or loaded, in the usual and customary course of business. The other companies also denied indebtedness to the C. C. C. & St. L. Ry. Co., and in effect set up the defense that the cars were in interstate commerce business.

On the 22d of May, 1906, the court sustained the motion to quash the judgment and discharge the garnishees thereunder. On June 6 "the court" (we quote from the record) "rendered further judgment, dismissing the said cause of action as to said principal defendant, on the ground that the court had no jurisdiction of the defendant or the attached property of the defendant, and taxed the costs in the case to the plaintiff."

The time for the allowance and filing the bill of exceptions was extended to October 28, 1906, and on the 28th of September it was allowed, the order reciting that the date "being one of the regular days of the May, A. D., 1906, term of said court." The bill of exceptions also recited that it was submitted to the court, with a prayer that it "be signed and certified by the judge, and approved by him, and made a part of the record in said case, preparatory to the prosecution of a writ of error from the said circuit court of the United States to the Supreme Court of the United States." It concludes as follows:

"And the court, having examined said transcript of the record, papers, and proceedings, hereby certifies that the same contains the entire record in said cause, including the plaintiff's petition, the answers of the garnishees, the defendant's motion to quash and set aside service, and the plaintiff's resistance thereto, and all of the proceedings had thereunder in reference thereto, including the opinion, orders, and judgment of the court thereon, and the exceptions of the plaintiff thereto, and all of the record submitted to the court upon which the judgment herein was rendered.

"On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $500, which shall operate as a supersedeas bond.

"And in this case, I, the undersigned, judge of the circuit court of the United States in and for the northern district of Iowa, western division, further hereby certify that in sustaining the motion to quash the attachment and discharging the garnishees, and in dismissing the action as to the principal defendant, and taxing the costs to the plaintiff, the sole question considered and determined by the court was that the court had no jurisdiction over the person of the defendant or of the property involved, and that the appearance of the principal defendant, as shown by the record, was a special, and not a general, appearance, and that the same did not subject said principal defendant and its property to the jurisdiction of the court.

"This certificate is made conformable to the act of Congress of March 3, 1891, chapter 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488, and the opinion filed herein is made a part of

the record, and will be certified and sent up as part of the proceeding, together with this certificate."

For the opinion of the court, see 146 Fed. 403.

A writ of error was sued out from the circuit court of appeals according to the admission of counsel, though there is nothing in the record to show it, which writ was dismissed. 84 C. C. A. 453, 156 Fed. 775.

A motion is made to dismiss the writ of error, and in support of the motion it is urged (1) that the certificate as to jurisdiction was not granted during the term at which the judgment was rendered; (2) that the writ of error was not perfected in time, as required by law, in that the writ and certificate were allowed on the 28th of September, 1906, and were not prosecuted in this court until April, 1908; (3) that the certificate is not sufficient in law nor proper in form, in that it does not state any facts or propositions of law upon which the question of the court's lack of jurisdiction rested; (4) that the jurisdiction of the court as a Federal court was not put in issue; (5) that the case having been taken to the circuit court of appeals, and there decided, that the writ of error should be to that court, and not to the circuit court, the latter court, it is urged, having lost jurisdiction of the case; (6) there is no certificate of a jurisdictional question in the order allowing the writ of error.

The first and second grounds in support of the motion to dismiss are based upon a misapprehension of the record. The term at which the judgment was rendered had not expired when the certificate of jurisdiction was made, and the writ of error was allowed on the 18th of March, 1908, not on September 28, 1906, as contended by defendants in error.

The grounds of the motion based on the form or sufficiency of the certificate are not tenable. Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, the record shows clearly that the only matter tried and decided in the circuit court was one of jurisdiction. This is sufficient. United States *v.* Larkin, 208 U. S. 333, 339, 52 L. ed. 517, 520, 28 Sup. Ct. Rep. 417.

The other grounds urged to support the motion to dismiss all depend upon the proposition whether the question of the jurisdiction of the circuit court as a Federal court was presented. If so, the writ of error from the circuit court of appeals is no bar to the present writ of error. Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; United States *v.* Larkin, *supra*. And if so, the way is clear to a decision of the question on the merits.

As we have shown, the circuit court decided that it had no jurisdiction over either the person or the property of the principal defendant, the C. C. C. & St. L. Ry. Co. The first, non-jurisdiction over the person, depending, as the court considered,

upon the second, nonjurisdiction over the property, as we understand the opinion. And this veiw of it the circuit court of appeals took.

The latter court stated the questions to be: "We defendant's appearance to contest the validity of the attachments and garnishments a general one? Were the cars and credits of defendant subject to attachment and garnishment? In other words, did the trial court secure such dominion over person or property by appearance or process as authorized it to proceed to trial of the action and render a valid judgment upon the issues involved? The trial court answered them in the negative and dismissed the action for want of jurisdiction. In respect of the essential character of these questions, they are not distinguishable from one of the legality of the service of summons upon a defendant. They do not pertain to the merits of the case, and did not arise during the progress of a trial. They lay at the threshold, and upon an affirmative answer depended the power of the court to hear and decide the cause. In legal phraseology that power is termed 'jurisdiction.' It is none the less a jurisdictional matter in the case of attachment and garnishment of property of a nonresident because the power of the court to proceed to trial depends, in the absence of the defendant, upon its lawful seizure of his property. The question of jurisdiction was decided in favor of defendant, and the decision disposed of the case." For these propositions the court cited Board of Trade *v.* Hammond, Elevator Co., 198 U. S. 428, 49 L. ed. 1114, 25 Sup. Ct. Rep. 740; United States *v.* Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39; St. Louis Cotton Compress Co. *v.* American Cotton Co. 60 C. C. A. 80, 125 Fed. 196; and, as we have seen, dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the circuit court of appeals, for which also may be cited Kendall *v.* American Automatic Loom Co. 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768. The motion to dismiss is denied.

The ruling of the circuit court dismissing the action is attacked upon the grounds (1) that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance, and, being so, the railway company submitted itself to the jurisdiction of the court, "regardless of the seizure of the attached property;" (2) that the property was subject to attachment.

1. It is not controverted that, if the property was subject to attachment, the procedure prescribed by the laws of Iowa was duly observed, and hence, it is contended, that the property having been seized under the jurisdiction of the court, under valid, regular process, the motion to quash the attachment was based on matters *dehors* the record, going to the jurisdiction of the court over the subject-matter of the action, and the court

had jurisdiction over the person of the railway company. "A special appearance," it is contented, "can never serve a dual or triple purpose, but is only allowed for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant."

The ruling of the circuit court, we think, was broader than plaintiff conceives it to have been. It appears from the record that the C. C. C. & St. L. Ry. Co. was a corporation of Indiana and Ohio, and that certain of its freight cars were attached in Iowa in the hands of the garnishee companies, and that there were certain credits due to it from some of the latter companies, on account of interstate commerce freight. In other words, it fairly appears upon the face of the complaint in the action and the attachment papers that the cars had been sent into the state in the transportation of interstate commerce. It is true, it was also contended, that an issue was presented by the affidavits upon the motion to quash as to what contractual arrangements existed between the company and the other companies as to the right of the latter companies to reload the cars and so return them, but there was no dispute that it was their duty to receive them. Besides, the bill of exceptions contains the following: "No evidence is submitted by the plaintiff in opposition to the motion of defendant to quash the attachment, or in support of its pleading controverting the answer of the several garnishees, and the matters are submitted upon the record, including such motion and admission of the pleadings."

The question, therefore, was submitted to the court, whether the cars, under the circumstances, were engaged in interstate commerce when they were attached; and the court considered it to be immaterial that the cars had not started on a return trip, saying that "the cars of defendant, when brought into the state of Iowa to complete an interstate shipment of property, were being used in interstate commerce, and were being so used while waiting, at least a reasonable time, it be loaded for the return trip."

The court further decided that debts, if any, which were due from the garnishee companies to the C. C. C. & St. L. Ry. Co. for its share of the price of carriage were "as much a part of interstate commerce, as defined by the Supreme Court, as the actual carriage of their property."

2. The next contention of plaintiff is that the appearance of the C. C. C. & St. L. Ry. Co. was a general appearance, and submitted its person to the jurisdiction of the court. In other words, it is contended that the person over whom personal jurisdiction has not been obtained cannot appear especially to set aside the attachment of his property, which we must assume, in order to completely exhibit the contention, is valid. We cannot concur in the contention. It is supported, it is true by some cases,

but it is opposed by more. Drake, Attachm. § 112, and cases cited. The stronger reasoning, we think, too, is against the contention. A court, without personal service, can acquire no jurisdiction over the person, and when it attempts to assert jurisdiction over property it should be open to the defendant to specially appear to contest its control over such property; in other words, to contest the ground of its jurisdiction. Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237; Southern P. Co. *v.* Denton, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; Goldey *v.* Morning News, 156 U. S. 518, 523, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; Wabash Western R. Co. *v.* Brow, 164 U. S. 271, 278, 41 L. ed. 431, 434, 17 Sup. Ct. Rep. 126.

The appearance of the C. C. C. & St. L. Ry. Co. was not to object to the subject-matter of the action, as it is contended by plaintiff. The subject-matter of the action is a demand for damages, which can only be prosecuted to efficient judgment and be satisfied out of the property attached. Clark *v.* Wells, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43. The jurisdiction of the court, therefore, depended upon the attachment, and the appearance to set that aside was an appearance to object to the jurisdiction. In other words, the defendant was only in court through its property, and it appeared specially to show that it was improperly in court.

These contentions being disposed of, we are brought to the question whether the cars were "immune from judicial process" because engaged in interstate commerce. The question has come up in several of the state courts and different views have been taken. The question has been answered in the affirmative in Michigan C. R. Co. *v.* Chicago & M. L. S. R. Co. 1 Ill. App. 399; Connery *v.* Quincy. O. & K. C. R. Co. 92 Minn. 20, 64 L. R. A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347; Shore *v.* Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909; Seibels *v.* Northern C. R. Co. 80 S. C. 133, 16 L. R. A. (N. S.) 1026, 61 S. E. 435; Chicago & N. W. R. Co. *v.* Forest County, 195 Wis. 80, 70 N. W. 77; Wall *v.* Norfolk & W. R. Co. 52 W. Va. 485, 64 L. R. A. 501, 94 Am. St. Rep. 948, 44 S. E. 294. A negative answer has been pronounced in the following cases: De Rochemont *v.* New York C. & H. R. R. Co. 75 N. H. 158,—L. R. A. (N. S.)—, 71 Atl. 868; Southern Flour & Grain Co. *v.* Northern P. R. Co. 127 Ga. 626, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 A. & E. Ann. Cas. 437; Southern R. Co. *v.* Brown, 131 Ga. 245, 62 S. E. 177; Cavanaugh *v.* Chicago, R. I. & P. R. Co. 75 N. H. 243, 72 Atl. 694. See also Humphreys *v.* Hopkins, 81 Cal. 551, 6 L. R. A. 792, 15 Am. St. Rep. 76, 22 Pac. 892. Cavanaugh *v.* Chicago, R. I. & P. R. Co. *supra*, may be assigned to the list of cases giving a negative answer. In that case there was an attachment of credits or funds representing the sending

carrier's part of transportation charges on interstate freight. The attachment was sustained. In Wall *v.* Norfolk & W. R. Co. the levy was upon cars which were unloading. In the case in 1 Ill. App. the condition or situation of the cars does not clearly appear. In the other cases, the cars were not in use when attached. In most of the cases there is a full and able discussion of the principles involved. In Humphreys *v.* Hopkins it was taken for granted that the cars were subject to process, the case going off on another point.

The answer to the question is, therefore, certainly not obvious, and counsel, realizing it, have pressed many considerations on our attention. Their arguments result in certain contentions. The plaintiff's contention is, that even though the cars in question had been or were to be used in interstate commerce, their attachment was not a regulation of such commerce, and that they were as legally subject to attachment as the property of any other nonresident. The contention of the defendants is an exact antithesis of that of plaintiff. It is that the state laws cannot be permitted to impede or impair interstate traffic or the usefulness of the facilities for such traffic. And, further, that the provisions of the interstate commerce act, providing for the establishment of through routes, and § 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), providing for the connection of railroads, exempt the cars from attachment.

In our discussion we may address ourselves to the contention of defendants. They do not contend that the laws of the state have the purpose to interfere with the interstate commerce, or are directly contrary to the acts of Congress. They do contend, however, that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the acts of Congress." In other words, that the acts of Congress constitute a declaration of exemption of railroad property from attachment, and, of course, from execution as well, by reason of their provisions for continuity of transportation.

This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the acts of Congress. Obligations it surely will have to creditors, inevitable even in providing equipment for its duties.—inevitable in its performance of them. It would seem, therefore, that the contentions of the defendants are but deductions from the broader proposition that all of the property of the railroad company is put apart in a kind of civil sanctuary. And one case (Wall *v.* Norfolk & W. R. Co., *supra*) seems to give this extent to the exemption. Indeed, the decision in the case at bar seems to do so, the court holding, as we have seen,

that the C. C. C. & St. L. Ry. Co.'s share of the compensation for carriage was as much a part of interstate commerce as the actual carriage of property. A still broader proposition under the contention might be urged. If the property have such character that all obligations of the company must yield to the public use or to the obligations imposed by Congress, the railroad company itself, it might be contended, cannot burden its property, and that its property is taken from it as an asset of credit, the means it may be, of performing the very duties enjoined upon it; and the anomaly will be presented of the duties it is to perform becoming an obstacle to acquiring the means of performing them. Indeed, the further consequence might be said to follow that the rolling stock of a railroad is exempt from taxation; at least, so far as taxation might be attempted to be enforced against the rolling stock. We realize that a proposition may be generally applicable and yet involve embarrassment when pushed to a logical extreme. If this be so of the contentions of defendant, it may be so of the counter contentions which would subject the cars of a railroad company to attachment process, however engaged or wherever situate.

It is very certain that when Congress enacted the interstate commerce law it did not intend to abrogate the attachment laws of the states. It is very certain that there is no conscious purpose in the laws of the states to regulate, directly or indirectly, interstate commerce. We may put out of the case, therefore, as an element, an attempt of the state to exercise control over interstate commerce in excess of its power. Indeed, the questions in this case might arise upon process issued out of the circuit court of the United States under the Federal statutes. For, by §§ 915 and 916 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 684), remedies "by attachment or other process," before judgment, and "by execution or otherwise," after judgment, are given litigants in common-law causes in the circuit and district courts of the United States.

The questions in the case, therefore, depend for their solution upon the interpretation of Federal laws. Are the laws of the states for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit, and because they give support to commerce, state and interstate) and the Federal laws which permit or enjoin continuity of transportation, so far incompatible that the provisions of the latter must be construed as displacing the former? We do not think so. Section 5258 of the Revised Statutes is permissive, not imperative. It removed the "trammels interposed by state enactments or by existing laws of Congress" to the powers of railroad companies to make continuous lines of transportation. Dubuque & S. C. R. Co. *v.* Richmond, 19 Wall. 584, 589, 22 L. ed. 173, 176. The interstate commerce act, however, has a different character.

It restricts the powers of the railroads. It regulates interstate railroads and makes it unlawful for them, by any "means or devices," to prevent "the carriage of freight from being continuous from the place of shipment to the place of destination."†

The interstate commerce law, therefore, is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors, or take from their creditors any remedial process provided by the laws of the state, and as we have seen, provided by Federal law as well. May it be said that such result follows from the use of property in the public service? A number of cases may be cited against such contention. We have already pointed out what might be contended as its possible if not probable consequences. In a recent case in this court, a lien imposed under the law of Michigan upon a vessel to be used in domestic and foreign trade was sustained. To the contention that the enforcement of the lien while the vessel was engaged in interstate commerce was unlawful and void, in view of the exclusive control of Congress over the subject, we answered: "But it must be remembered that concerning contracts not maritime in their nature, the state has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character. The laws of the states enforcing attachment and execution in cases cognizable in state courts have been sustained and upheld. Johnson *v.* Chicago & P. Elevator Co. 119 U. S. 388-398, 30 L. ed. 447-450, 7 Sup. Ct. Rep. 254. The state may pass laws enforcing the rights of its citizens which affect interstate commerce, but fall short of regulating such commerce in the sense in which the Constitution gives exclusive jurisdiction to Congress. Sherlock *v.* Alling, 93 U. S. 99, 103, 23 L. ed. 819; Kidd *v* Pearson, 128 U. S. 1, 23, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Pennsylvania

†Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated as, one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith, for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of this act. [24 Stat. at L. 382, chap. 104, U. S. Comp. Stat. 1901, p. 3159.]

R. Co. *v.* Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132." The Winnebago (Iroquois Transp. Co. *v.* De Laney Forge & Iron Co.) 205 U. S. 354, 362, 51 L. ed. 836, 840, 27 Sup. Ct. Rep. 509.

The interference with interstate commerce by the enforcement of the attachment laws of a state must not be exaggerated. It can only be occasional and temporary. The obligations of a railroad company are tolerably certain, and provisions for them can be easily made. Their sudden assertion can be almost instantly met; at any rate, after short delay, and without much, if any, embarrassment to the continuity of transportation. However, the pending case does not call for a very comprehensive decision on the subject. We only decide that the cars situated as this record tends to show that they were when attached, and the amounts due from the garnishee companies to the C. C. C. & St. L. Ry. Co., were not exempt from process under the state laws, and that the court had, therefore, jurisdiction of them, and through them of the C. C. C. & St. L. Ry. Co.

Judgment reversed and the cause remanded with directions to proceed in accordance with this opinion.

Mr. Justice HOLMES took no part in the decision.

KANSAS CITY, M. & O. RY. CO. *v.* COX.

(Supreme Court of Oklahoma, March 8, 1910.)

[108 Pac. Rep. 380.]

Carriers—Freight—Delivery to Carrier.*—The mere fact that the owner of goods has loaded them in a car for shipment, even though the carrier, by the owner's direction, has placed the car in a position convenient for such purpose, will not of itself be sufficient to make the carrier an insurer of the goods loaded. Before the delivery will be deemed complete, the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier.

Carriers—Injury to Freight—Liability of Carrier.†—The strict rules making the carrier an insurer of freight have no application where the relation of the parties is not that of carrier and consignee or owner, and in such cases the carrier is liable only for losses resulting from its own negligence.

(Syllabus by the Court.)

*See last foot-note of Lord *v.* Maine Cent. R. Co. (Me.), 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130; second head-note of St. Louis, etc., Ry. Co. *v.* Burrow & Co. (Ark.), 33 R. R. R. 754, 56 Am. & Eng. R. Cas., N. S., 754.

†See extensive note, 23 R. R. R. 177, 46 Am. & Eng. R. Cas., N. S., 177.

Kansas City, etc., Ry. Co. *v.* Cox

Error from District Court, Woods County; John L. Pancoast, Judge.

Action by John L. Cox against the Kansas City, Mexico & Orient Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

John A. Eaton and *Dudley W. Eaton,* for plaintiff in error.

KANE, J. This was an action, commenced by the defendant in error, as plaintiff below, against the plaintiff in error, defendant below, to recover damages for the destruction, by fire, of a certain lot of broom corn. After both sides had introduced their evidence and rested, the court instructed the jury that the evidence introduced showed that the railroad company was responsible for the car load of broom corn as a common carrier and was therefore an insurer of the property; that under such circumstances it was the duty of the jury to return a verdict for the plaintiff for the value of the broom corn, stating the value thereof to be $575.25. The jury, without retiring, brought in a verdict in accordance with the instructions of the court, upon which judgment was duly entered. To reverse this judgment this proceeding in error was commenced.

It is stated by counsel for plaintiff in error, in their brief, and, as counsel for defendant in error have filed no brief calling our attention to any discrepancy in the statement, we take it to be true, that there was evidence introduced at the trial reasonably tending to prove that on the 26th or 27th of January, 1906, pursuant to the order of the plaintiff, a car was placed upon the side track by the defendant at a broom corn platform erected by the defendant on the east side of one of its side tracks for the purpose of enabling shippers to conveniently and easily load the car with broom corn; that on the next day Mr. Greenlee, acting as the agent for the plaintiff, loaded some broom corn in said car. On the next day, to wit, the 28th day of January, six more bales were loaded. On the 29th day of January, more broom corn, enough to finish the car load, was loaded into the car, after which the door to the car was closed. After finishing loading the car, the plaintiff, or the party employed by him to do the loading, closed the door of the car and notified Mr. Cox, the plaintiff, that the car was loaded, but did not notify the agent of the company that the car was loaded, and did not give the agent any information as to the destination of the car or the name of the consignee. The last time that Mr. Cox saw the car was Saturday, January 27th, about noon, at which time the car was all loaded except about 15 bales. Cox did not notify the agent of the company that the car was loaded, nor did he notify him who the consignee of the car was to be, or where it was to go. The railway company had not

issued a bill of lading, and Cox had not paid the freight. Cox had been for some time shipping broom corn from Fairview, and it was his custom when the cars were loaded to notify the agent that they were loaded, and give him the name of the consignee, the route the car was to take, and its destination; but none of these things had been done with reference to this car. The car was destroyed by fire about 2 o'clock in the morning of January 30th; the facts up to that time being as above stated. We are of the opinion that this evidence was sufficient to carry the case to the jury.

From the authorities cited by counsel for plaintiff in error, it seems clear that, before the railway company could be held liable as a common carrier, it must appear that it had been notified that the broom corn was ready for shipment or apprised of the name of the consignee. Hutchinson on Carriers (3d Ed.) § 125, pp. 122, 123, states the rule as follows: "When the owner of the goods has done all in his power and all that he is required to do by his understanding with the carrier or the usage of the business to further the shipment, and it becomes then the duty of the carrier to do whatever else is necessary to put them in transit, the delivery and acceptance will be considered as complete from the time the carrier is informed that they are ready for him. The mere fact, therefore, that the owner of the goods has loaded them on a car, even though the carrier by the owner's directions has placed the car in a position convenient for such purpose, will not of itself be sufficient to constitute a delivery. Before the delivery will be deemed complete, the owner must not only have relinquished his control over the car, but notice that it was ready for shipment must have been given the carrier. Thus, where it was the course of business for a railroad company, when required to do so, to send its cars upon a side track at the place of shipment to receive cotton for transportation, and for the shipper there to load upon them the freight, makes out a manifest, and leave it with the agent of the company, who then had the bales counted, signed bills of lading, and sent locomotives to remove the cars thus loaded and place them in the train destined to the point to which the shipments were to be made, it was held that the delivery was complete as soon as the cotton was put upon the company's care in this manner by the shipper and the company's agent informed of the fact. And where the owner of lumber ordered a car in which to load lumber for the purpose of shipment, and the carrier, in pursuance of such order, placed a car on one of its side tracks for such purpose, and after the car was loaded, but before the carrier had been notified that it was ready for shipment, or had been apprised of the name of the consignee, it caught fire, and the lumber was destroyed, it was held that as the carrier had not been notified that the car was ready

for shipment, nor the name of the consignee given him, there was not such a delivery of the goods as to render him liable as a common carrier."

The case last referred to in the text is Basnight *v.* Railroad Co., 111 N. C. 592, 16 S. E. 323. Mr Justice MacRae, who delivered the opinion of the court, in discussing this proposition, says: "Taking the facts most strongly in favor of the plaintiff, he asked of the defendant's freight agent a car to load lumber to go to Philadelphia. The agent pointed out to the plaintiff a car which he might use for the desired purpose. The plaintiff loaded the car with lumber, and finished on the night of the 24th of December, but did not notify defendant's agent that the car was ready for shipment nor of the name of the consignee. Treating the loading of the car upon defendant's track as a delivery to defendant and an acceptance, it was not yet ready for transportation, for the defendant had not been notified of its readiness nor to whom it was to be shipped. It was necessary for the defendant to await further orders before shipment. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are so in his custody, is only liable as warehouseman. O'Neill *v.* Railroad, 60 N. Y. 138; Wells *v.* Railroad, 51 N. C. 47, 72 Am. Dec. 556; Angell on Carriers, § 129. He is only responsible as carrier where goods are delivered to and accepted by him in the usual course of business for immediate transportation."

Besides the foregoing authorities, counsel cites Stapleton *v.* Grand Trunk Ry. Co., 133 Mich. 187, 94 N. W. 739; 5 A. & E. Enc. Law, p. 184; Grosvenor *v.* New York Central Ry. Co., 39 N. Y. 34; Tate & Co. *v.* Yazoo, etc., R. R. Co., 78 Miss. 842, 29 South. 392, 84 Am. St. Rep. 649; St. Louis, Iron Mt. & So. Ry. Co. *v.* Murphy, 60 Orp. 333, 30 S. W. 419, 46 Am. St. Rep. 202; Mo. Pac. Ry. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712; and several other cases—all of which seem to be in point in their favor. The relation of common carrier and shipper not having arisen, the railway company's liability was that of a warehouseman, and it was only liable for failure to exercise ordinary care. It was error to charge it with a higher degree of responsibility. "The strict rules making the carrier an insurer of safe delivery of goods intrusted to have no application where the relation of the parties is not that of carrier and consignee or owner, or where the relation, though previously existing, had come to an end at the time of the delivery was made. In such cases the carrier is liable only for losses resulting from its own negligence." 5 A. & E. Enc. of L. 212.

There were several other errors assigned by counsel; but, upon the relation of the parties being fixed, they are not liable

to appear again. We do not, therefore, feel called upon to discuss them.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

DUNN, C. J., and HAYES and TURNER, JJ., concur. WILLIAMS, J., disqualified, not sitting.

STATE *ex rel* BURR *et al.*, Railroad Com'rs, *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, Feb. 1, 1910. Headnotes Filed April 20, 1910.)

[52 So. Rep. 4.]

Carriers—Regulation—Rule of Railroad Commissioners—Construction.—Rule 15A of the Railroad Commissioners of this state merely fixes a rate for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state to any planing mill in the Jacksonville yards, and thence, after lumber is dressed, to any point in said yards. This rule does not seek to compel a service.

Carriers—Stopping Lumber in Transit for Treatment—Nature of Right.—The service contemplated by rule 15A of the Railroad Commissioners of this state, the stopping of a commodity in transit for the purpose of treatment, is in the nature of a special privilege, which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right.

Carriers—Stopping Lumber in Transit for Treatment—Compensation.—The carrier is entitled to compensation, a reasonable profit beyond the mere costs for the extra service rendered, and the privilege extended of stopping cars loaded with lumber at planing mills for treatment and then transporting and delivering them to the place of destination.

Carriers—Granting Milling Privilege in Transit—Discrimination.—Carriers may not discriminate between markets nor between individuals in the granting of the privilege of milling in transit, and Railroad Commissioners likewise, in regulating such privileges, may not unjustly discriminate.

Carriers—Regulation—Rates for Allowing Milling of Lumber in Transit.—It is not essential to the validity of rule 15A of the Railroad Commissioners that it should prescribe or fix one rate for the service of milling in transit to be rendered in all markets and localities of the state. The circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service.

State *v.* Atlantic Coast Line R. Co

Carriers—Regulation of Rates—Milling Privilege in Transit.—Whether the service of milling in transit as contemplated by rule 13A may or may not be enforced as a duty, yet, when voluntarily entered upon, it may be regulated and the charges therefor prescribed by the Railroad Commissioners.

Carriers—Duties Arising from Usage.—It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and, when once established, the obligation of such carriers to perform them is as binding in the one case as in the other.

Dedication—Public Use.—Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large, and, when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created.

Mandamus—Motion to Quash—Matters Not Found in Alternative Writ.—Matters stated in a motion to quash or in respondent's brief cannot be considered if not found in the alternative writ.

(Syllabus by the Court.)

In Banc. Mandamus by the State, at the relation of R. Hudson Burr and others, Railroad Commissioners, against the Atlantic Coast Line Railroad Company. Motion to quash alternative writ overruled, and respondent required to answer.

An alternative writ of mandamus was issued here, as follows:

"In the Supreme Court of the State of Florida.

"The State of Florida, to Atlantic Coast Line Railroad Company—Greeting:

"Whereas by a petition filed by our Railroad Commissioners in our Supreme Court in the name of the state of Florida, through Louis C. Massey, as special counsel for our said Railroad Commissioners designated by them, it has been made to appear:

"(1) That the Atlantic Coast Line Railroad Company is a railroad corporation existing under the laws of the state of Virginia which on the first day of July, 1902, became the owner of divers lines of railway in the state of Florida by purchase from the Savannah, Florida & Western Railway Company, which lines, with others since acquired in this state, particularly the Jacksonville Southwestern Railway extending from Jacksonville to Newberry, it operates as a common carrier of persons and property, including rough and dressed lumber, from points in this state to other points therein.

"(2) That the city of Jacksonville is an important station on some of the said lines of the Atlantic Coast Line Railroad Company, where it maintains and operates by virtue of owner-

ship or of right by lease, contract or otherwise, extensive terminals, railroad yards and switching facilities for the reception, handling, transportation and delivery of property transported by it to and from the city of Jacksonville from and to other points in this state, and that such terminals, railroad yards and switching facilities, or some portion thereof, were maintained and operated by the Savannah, Florida & Western Railway Company, the predecessor in the title of the Atlantic Coast Line Railroad Company, since about the year 1884 to the time of the sale thereof as aforesaid, on July 1, 1902. That other railroad companies whose lines enter the city of Jacksonville also maintain and operate like terminals, railroad yards and switching facilities for like purposes, as they or their predecessors have done for many years, and the said terminals and railroad yards, including those of the Atlantic Coast Line Railroad Company, are all connected together by transfer tracks and switches, so that the terminal tracks and railroad yards of the city of Jacksonville cover a vast extent of territory in and around said city.

"(3) That as hereinbefore set forth, the said railroad yards in the city of Jacksonville or a portion thereof have been maintained and operated for many years past by the railroads entering that city, and as far back at least as the year 1891 planing mills have been established within the said yard limits and accessible to the tracks therein, to which it was and is usual customary for the railroad companies to switch upon order of the consignees, cars of rough lumber shipped to and arriving at the city of Jacksonville from other points in this state, for the purpose of dressing the same, and after dressing to switch the said cars of lumber to some other point in the yards designated by the said consignees.

"(4) That in the year 1891 and from thence continuously until the year 1907 the said railroad companies entering the city of Jacksonville aforesaid, including the Savannah, Florida & Western Railway Company and its successor the Atlantic Coast Line Railroad Company, made a charge of two dollars per car for switching cars of rough lumber shipped to the said city, to a mill within the yards as aforesaid, and thence, after the dressing of the lumber, to some other point in the said yards for delivery, and this charge was the same, whether the switching movement of the car was over the tracks of one or more railroads; but about the autumn of the year 1907, the said railroad companies maintaining and operating the railroad yards at the said city increased the charge for the said service to five dollars per car if the switching was over the tracks of one railroad company only, and to seven dollars per car if it was over the tracks of two railroad companies.

"(5) That upon the complaints of citizens of Jacksonville

and of other parts of this state that the charges exacted as aforesaid by the railroad companies were exorbitant and unreasonable, your petitioners gave due notice of their intended action and of the time and place of hearing, to all the railroad companies and to the persons interested, and pursuant to said notice held a session in the city of Jacksonville on December 8, 1908, at which a very full and exhaustive hearing of all the parties interested was had, and thereupon on December 19, 1908, your petitioners prescribed a rate for the said services in a new rule to take effect January 1, 1909, and to be known as rule 15A of the 'Rules Governing the Transportation of Freight, which is as follows:

"'15A. The charge for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state to any planing mill in the Jacksonville yards, and thence, after lumber is dressed, to any point in the same yards, shall not be more than $2.00 per car; provided, that when the said switching movement is over the tracks of more than one railroad, a charge of not more than $3.00 may be made. This rule shall not be interpreted as rescinding or modifying rule 15 except as herein specifically provided.'

"(6) That rule 15 of the 'Rules Governing the Transportation of Freight,' referred to in said rule 15A, is, and was at the time of making the order last aforesaid, as follows:

"'15. A charge of not more than $2.00 per car, without regard to its weight or contents, will be allowed for transporting, switching or transferring a loaded car from any point on any railroad to any connecting railroad, or to any warehouse, side track or other point of delivery that may be designated by the consignee, within a distance of three miles from the point of starting, and no railroad company shall decline or refuse to transport, switch or transfer any car as above, or, to receive it from any connecting railroad for such purposes. When in the transfer, switching or transportation of a car between such points, it is necessary to pass over the track or tracks of any intermediate railroad or railroads, said maximum charge of two dollars shall be equitably divided between the railroads at interest. When a charge is made for the transfer, switching or transportation of a loaded car between such points, no additional charge shall be made for the accompanying movement of the empty car in the opposite direction. Provided, that this rule shall not interfere with any prevailing legal rate for the transportation of freight between different stations; and shall not apply to any freight that does not pay a direct freight transportation charge in connection with a switching charge.'

"(7) That the Atlantic Coast Line Railroad Company has entirely ignored and refused to charge and put into effect the rate prescribed in and by said rule 15A, but has charged and

received since January 1, 1909, and is still charging and receiving the sum of five dollars for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to a planing mill in the Jacksonville yards and thence, after the lumber is dressed, to a point in the same yards when the said switching movement is over its own tracks only, for which service under the said rule 15A it is entitled to charge and receive the sum of two dollars.

"(8) That your petitioners, as the Railroad Commissioners of this state, and the people of this state are entirely without adequate remedy in the premises unless it be afforded them by the interposition of this honorable court through a writ of mandamus.

"Now therefore: We being willing that full and speedy justice be done in the premises, do command you, the Atlantic Coast Line Railroad Company, forthwith to observe the rate prescribed in rule 15A of the 'Rules Governing the Transportation of Freight' by our Railroad Commissioners for switching cars of lumber over your own tracks only in the Jacksonville yards; that is to say, to charge and receive no more than the sum of two dollars per car for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards and thence, after lumber dressed to any point in the same yards, when the said switching movement is over your own tracks only; or that you appear before the justices of our Supreme Court, sitting within and for the state of Florida at the Courtroom in the city of Tallahassee on the twenty-second day of June, A. D. 1909, at 10 o'clock a. m. of that day, and show cause why you refuse so to do and have you then and there this writ.

"Witness the Honorable James B. Whitfield, Chief Justice of the Supreme Court of the state of Florida, and the seal of the said Supreme Court, at Tallahassee, the Capital, this eighth day of June, A. D. 1909.

"[Seal] M. H. Mabry,
"Clerk Supreme Court, State of Florida."

The respondent filed a motion to quash the alternative writ of mandamus upon the following grounds:

"First. No power is conferred by law upon the Florida Railroad Commissioners to make and enforce the rule set forth in said alternative writ as 'rule 15A,' of the Rules Governing the Transportation of Freight.

"Second. That the effect of the enforcement of rule 15A set out in the alternative writ would be to deprive the defendant of its property without due process of law, and therefore, in contravention of the fourteenth amendment of the Constitution of the United States.

"Third. The alternative writ shows the movement covered by said rule 15A is not a switching movement, and does not make provision for compensation for a switching movement or service, but shows that the movement covered by it is a transportation movement or service, and makes provision for a transportation service.

"Fourth. By order No. 248 set out in the alternative writ, whereby rules No. 15 and No. 15A are a part of one regulation, the said two rules taken together are so inconsistent and uncertain as to be incapable of enforcement.

"Fifth. The alternative writ shows that the movement covered by said rule 15A is not a switching movement, and does not make provision for compensation for a switching movement, or service, but shows that the movement covered by it is a transportation movement, or service, and makes provision for a transportation service, which provision is discriminatory against, and unreasonable, arbitrary, and illegal as to the respondent, and other like railroad companies and common carriers, at Jacksonville, Fla., as against and in the case of like railroad companies and common carriers at other points in the state of Florida.

"Sixth. Rule 15A produces an unjust and illegal discrimination in that it provides a particular and lesser rate for a particular class of manufacturers, shippers, and consignees, to wit, manufacturers of dressed lumber, at a particular point in Florida, to wit, Jacksonville, Fla., as against other manufacturers, shippers, and consignees of other products at the same point, Jacksonville, and as against manufacturers, shippers, and consignees of the same and other products at other points in the state of Florida.

"Seventh. Rule 15A shows upon the part of the Railroad Commissioners an arbitrary intent to discriminate, not only against manufacturers, shippers, and consignees other than manufacturers, shippers, and consignees, of dressed lumber, at Jacksonville, Fla., but also the same intent as against all shippers, manufacturers, and consignees at other points than at Jacksonville, Fla., and a disposition to arbitrarily control the transportation, at Jacksonville, of dressed lumber, to the benefit of manufacturers, shippers, and consignees of dressed lumber at Jacksonville, regardless of law and the rules condemning irregularity and discrimination.

"Seventh. (a). That this rule sought to be enforced is unreasonable and unjust.

"Eighth. And for other grounds apparent upon the face of said writ. Wherefore, respondent prays that said writ be quashed."

W. E. Kay General Counsel, and *Doggett & Smith,* Division Counsel (*Geo. P. Raney* and *E. J. L'Engle,* of counsel), for the motion.

L. C. Massey, opposed.

PARKHILL, J. (after stating the facts as above). An interesting and important as it is, the question whether the effect of the enforcement of rule 15A would be to deprive the respondent of its property without due process of law, and therefore in contravention of the fourteenth amendment of the Constitution of the United States, because it requires, as argued, that railroads shall part with their cars or make connections with other railroads without due process of law, does not confront us. This rule does not seek to compel a service, but merely to fix a rate therefor. "The charge for switching cars of rough lumber * * * to any planing mill in the Jacksonville yards and thence, if the lumber is dressed, to any point in the same yards, shall not be more than two dollars per car. * * *" It is true that the rule further provides "that when the said switching movement is over the tracks of more than one railroad a charge of not more than three dollars may be made," but such rule nowhere requires or compels the service over more than one railroad, and the alternative writ herein complains that the respondent only "has * * * refused to charge and put into effect the rate prescribed in and by said rule 15A, but has charged and received * * * and is still charging and receiving the sum of five dollars for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to a planing mill in the Jacksonville yards and thence, after the lumber is dressed, to a point in the same yards when the said switching movement is over its own tracks only, for which service under the said rule 15A it is entitled to charge and receive the sum of two dollars." And the command of the writ is that the respondent forthwith "observe the rate prescribed in rule 15A of the 'Rules Governing Transportation of Freight' by our Railroad Commissioners for switching cars of lumber over your own tracks only in the Jacksonville yards; that is to say, to charge and receive no more than the sum of two dollars per car for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards and thence, after lumber is dressed, to any points in the same yards, when the switching movement is over your own tracks only."

It is also true that rule 15, in prescribing a rate for transporting, switching, or transferring a loaded car from any point on any railroad to any connecting railroad, or to any warehouse, side track, or any other point of delivery that may be designated by the consignee within a distance of three miles from the point

of starting, provides that no railroad company shall decline or refuse to so transport, switch, or transfer any car, or to receive it from any connecting railroad for such purpose; but the service here contemplated is entirely distinct from that of switching cars of rough lumber to a planing mill and thence if the lumber is dressed to any point in the same yards, as provided by rule 15A.

The service contemplated by rule 15A, the stopping of a commodity in transit for the purpose of treatment, is said to be in the nature of a special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. Diamond Mills *v.* Boston & M. R. R. Co., 9 Interst. Com. R. 311. Whether the carrier is or is not under obligations to permit the interruption of the transit, the rule merely seeks to regulate the charge for such service when rendered. Whether intentionally or not, rule 15A seems not to have determined that question as far as the Commission may determine it, for it fails to contain the provision that no railroad company shall decline or refuse to transport, switch, or transfer any such car, or the further provision that no railroad shall receive such car from any connecting railroad for such purposes, while these provisions are made a part of rule 15, which provides a rate for transporting, switching, or transferring a loaded car from any point on a railroad to any connecting railroad or to any warehouse, side track, etc., not stopping the commodity for the purpose of treatment.

As the rule plainly avoids the difficulties that have been suggested in the second ground of the motion to quash, we will not undertake to consider them. So understanding the two rules, 15 and 15A, and taking them together, we do not think them so inconsistent and uncertain as to be incapable of enforcement, as is suggested in the fourth ground of the motion to quash.

We cannot see, from anything in the alternative writ, wherein rule 15A is discriminatory against Jacksonville, or against localities other than that city, or against commodities and dealers therein, other than rough lumber, or against the respondent and other railroad companies and common carriers at Jacksonville and at other points in this state, as is contended for in the fifth, sixth, and seventh grounds of the motion to quash. In regard to these matters and contentions we must confine ourselves to the allegations of the alternative writ. Matters stated in the motion to quash or in respondent's brief cannot be considered, if not found in the alternative writ. State *ex rel.* Romano *v.* Yakey, 43 Wash. 15, 85 Pac. 990.

There is nothing in the alternative writ to show that there are any planing mills within railroad yards in localities or lumber markets other than Jacksonville, or that railroad companies in

these other localities either do not, or are compelled, to render the service of transfer to or from the mill if there be one, or that other commodities are shipped to Jacksonville or other localities for stoppage at mills of any kind for treatment, or that the charge made by other railroads for like service at other places is unreasonable or excessive. In fact, there is nothing on the face of the alternative writ to sustain the charge of unjust discrimination made in the motion to quash. We cannot see in the allegations of the alternative writ that rule 15A provides a lesser rate for manufacturers of dressed lumber at Jacksonville than it does for other manufacturers and shippers of other products at Jacksonville, and manufacturers, shippers, and consignees of the same and other products at other points in this state. Undoubtedly carriers may not discriminate between markets nor between individuals in the granting of such privileges as are contemplated by rule 15A (Southern Railway Company *v.* St. Louis Hay & Grain Company, 214 U. S. 297, 29 Sup. Ct. 678, 53 L. Ed. 1004), and the Commissioners likewise in regulating such privileges may not unjustly discriminate; but such discrimination, if it exists, should be set up by a return to the alternative writ. It cannot be made so to appear by motion to quash or in the form of a speaking demurrer, where there is nothing in the record as made by the alternative writ to evidence any such discrimination.

The alternative writ does not show that the rate fixed by the Commission in rule 15A is unreasonable, unjust, or exorbitant or unjustly discriminatory in amount against any other locality or person. If the rate is so illegal and unjust, it may be made to appear by return to the alternative writ; but for aught that appears the same rate may prevail for other markets, by virtue of other rules. There may be subdivisions of rule 15 for every letter of the alphabet dealing with other places, markets, and commodities. It is not essential to the validity of rule 15A that it should prescribe or fix one rate for the service to be rendered in all markets and localities of the state. A uniform rate is not essential to its legality. The circumstances of each road and each market or locality must determine the rates of toll to be properly allowed for this service. The carrier is entitled to receive some compensation beyond mere cost of this service, and the cost thereof may be greater or less in one city than in another. The fact that the rate fixed in rule 15A for Jacksonville is different from the uniform rate fixed by rule 15 does not show an unreasonable discrimination, for the service contemplated by the two rules is entirely different. There is a sphere of operation for both rules, and the rate prescribed for the service by one rule may be different from the rate fixed by the other rule, and yet both rates may be reasonable and just. Cincinnati, N. O. & T. P. R. R. Co. *v.* Interstate Commerce

Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Texas & P. R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; Interstate Commerce Commission *v.* Alabama Midland R. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414.

In State *ex rel.* Attorney General *v.* Atlantic Coast Line Ry., 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506, this court held that the rules and regulations made by the Railroad Commissioners to prevent unjust discriminations or other abuses by railroad companies are by law deemed and held to be prima facie reasonable and just, and, in the absence of a showing of unreasonableness, the enforcement of such rules and regulations against a railroad company will not, of itself, be a taking of property without due process of law, or deprive such railroad company of the equal protection of the laws. Whether the rate is in fact an unreasonable and unjust one must be determined upon answer or return and proof. See the note to City of Madison *et al. v.* Madison G. & E. Co. *et al.*, 129 Wis. 249, 108 N. W. 65, 9 Am. & Eng. Ann. Cas. 819, 823.

We come now to the first contention made by the motion to quash: "No power is conferred by law upon the Florida Railroad Commissioners to make and enforce the rule set forth in said alternative writ as 'rule 15A,' of the Rules Governing the Transportation of Freight."

Section 30 of article 16 of the Constitution invests the Legislature with "full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature." The Legislature, by section 2893 of the General Statutes, authorized and required the Railroad Commissioners to make reasonable and just rates of freight tariffs to be observed by all railroads, railroad companies, and common carriers doing business in this state over their respective lines or connecting lines, and to make reasonable and just regulations for the observance of the same as to charges at any and all points for the necessary handling and delivery of all kinds of freight, and for the prevention of any unjust discrimination in connection therewith; also to regulate charges for storage, wharfage, and demurrage, refrigerator cars, fruit boxes, icing, etc., in transit, and to direct and control all other matters pertaining to railroads that shall be for the good of the public. Matter of Tr. Village of Saratoga Springs *v.* Saratoga G. E. L. & P. Co., 191 N. Y. 123, 83 N. E. 793, 18 L. R. A. (N. S.) 713, 14 Am. & Eng. Ann. Cas. 606, 614.

Section 2896 of the General Statutes gives the Commissioners full power and authority to require any railroad, railroad company, or common carrier to properly operate its road or

transportation line, and to furnish all the necessary facilities for the convenient and prompt handling, transportation, and delivery of all freight offered along its line for transportation, and requires the Commissioners to provide and prescribe all such rules and regulations as may be necessary to secure such operation and the furnishing of such facilities and the prompt handling and delivery of all freights offered; and, by section 2891, the term "railroad," as used in the provisions already stated, is defined to include all the road in use by any corporation or other person operating a railroad. In section 2921 of the General Statutes the Commissioners are given and granted full authority to do and perform any act or thing necessary to be done to effectually carry out and enforce the provisions and objects of the chapter dealing with this subject.

Whether the Railroad Commissioners have express statutory authority to require the performance of the duties or the granting of the privileges contemplated by rule 15A or not, it is made to appear by the allegations of the alternative writ that, long before and at the time of the adoption of rule 15A by the Railroad Commissioners, "the said railroad yards in the city of Jacksonville or a portion thereof have been maintained and operated for many years past by the railroads entering that city, and as far back at least as the year 1891 planing mills have been established within the said yard limits and accessible to the tracks therein, to which it was and is usual and customary for the railroad companies to switch, upon order of the consignees, cars of rough lumber shipped to and arriving at the city of Jacksonville from other points in this state, for the purpose of dressing the same, and after dressing to switch the said cars of lumber to some other point in the yards designated by the said consignees."

In performing this service the railroad companies were "doing business over their respective lines or connecting lines," and section 2893 of the General Statutes authorized and required the Commissioners "to make reasonable and just rates of freight tariffs to be observed by such railroads and common carriers, and to make reasonable and just regulations for the observance of the same as to charges at any and all points for the necessary handling and delivery of freight and for the prevention of unjust discrimination in connection therewith."

This was a service, too, or matters pertaining to railroads for the good of the public, or, as the Constitution expressed it, "services of a public nature," and the statute authorizes the Commissioners to direct and control all such matters.

It is settled law that the duties of a common carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of such carriers to perform them is as binding in the one case as in the other. State *ex rel.* Attorney General *v.* Atlantic Coast Line R. R. Co., 51 Fla. 543,

41 South. 529; State *ex rel.* Attorney General *v.* Atlantic Coast Line R. R. Co., 52 Fla. 646, 41 South. 705, 12 L. R. A. (N. S.) 506; Norfolk & P. Belt Line R. Co. *v.* Commonwealth, 103 Va. 289, 49 S. E. 39. In other words, whenever a duty has been imposed either by usage or by statute the courts may be called on to give it effect. Memphis & L. R. R. Co. *v.* Southern Exp. Co., 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791.

If this may be said to be a drayage service, it is not a private drayage service, as suggested by respondent, but a public drayage business. Where does the company get authority to do a private drayage business? As the court said, in Munn *v.* Ill., 94 U. S. 113, text 125 (24 L. Ed. 77): "Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created." See, also, Southern Indiana Ry. Co. *et al. v.* Railroad Commission of Indiana (Ind.) 87 N. E. 966; State *ex rel.* Star Pub. Co. *v.* Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368; Jacobson *v.* Wisconsin, M. & P. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358; State *v.* Wabash, St. Louis & Pac. Ry. Co., 83 Mo. 144; Allnutt *v.* Inglis, 12 East 527.

We think it may be also said that the service in question is cognate to and so intimately connected with the public service involved in the carriage and delivery of freight by the railroad company as to constitute a part of such service, and consequently subject to governmental control.

The allegations of the writ show that the respondent maintains and operates extensive terminals, railroad yards, and switching facilities for the reception, handling, transportation, and delivery of freight or property transported by it, and these terminal and switching facilities are all connected together by transfer tracks and switches. The respondent has connected these spur tracks or switches with and made them a part of its railway system and devoted them to the purposes of traffic. That is a public use. Such being the case, they are not private tracks. While the respondent is entitled to compensation, a reasonable profit, for the extra service rendered and the privilege extended of stopping cars loaded with lumber at the planing mills for treatment and then transporting and delivering them to the place of destination, it is subject to the same obligation and public control as to these switches and spur tracks and the service over them as to its main line. State *ex rel.* Railroad & Warehouse Commission *v.* Willmar & S. F. R. Co., 88 Minn. 448, 93 N. W. 112; Chicago, B. & N. R. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75;

Barre R. Co. *v.* Montpelier & W. R. R. Co., 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785, 15 Am. St. Rep. 877.

By section 2891 of the General Statutes, the term "railroad" is defined to mean "all the road in use by any corporation," etc. As was said by the court in Missouri Pac. Ry. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899, "a railroad transporting a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight train." See, also, Louisville & Nashville R. Co. *v.* Central Stock Yards Co., 30 Ky. Law Rep. 18, 97 S. W. 778.

These tracks in the railroad yards in Jacksonville, then, are not mere private ways, outside of the principal road. They connect with it, are used as a part of it, conferring the same rights upon the company and imposing the same obligations as the main line. The people who have occasion for the transportation of rough lumber over them are interested in them. The public enjoy a beneficial use of them.

We conclude, therefore, that, whether the service contemplated by rule 15A may or may not be enforced as a duty, yet when voluntarily entered upon, as the writ shows is the case here, it may be regulated, and the charges therefore supervised by the Railroad Commissioners.

The motion to quash the alternative writ is overruled, and the respondent is required to answer within 20 days from the filing of this opinion. All concur, except TAYLOR, J., absent on account of illness.

RICHEY & GILBERT CO. *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Minnesota, April 1, 1910.)

[125 N. W. Rep. 897.]

Carriers—Duty to Furnish Cars.*—Where the usual course of business has been for a railway company to furnish cars at a warehouse maintained by a shipper, the shipper has the right to demand cars for its use, giving reasonable notice of its requirements; and, if loss results because of a wrongful refusal or neglect to furnish the cars, the shipper may recover.

Carriers—Duty to Furnish Cars—Tender of Goods for Shipment—Sufficiency.*—In such a case, the fact, particularly when communicated to the carrier, that the goods to be shipped are prepared for and immediately available for shipment, is a sufficient tender of the merchandise to the carrier.

Action—Carriers—Failure to Furnish Cars—Remedy of Shipper—Measure of Damages.†—An action for loss so occasioned is in tort; no contract having been made for delivery at any point. The measure of damages is the difference in value of the merchandise at the place of shipment, when offered for transportation, and its value at the same place, when shipping facilities were furnished.

Carriers—Failure to Furnish Cars—Sufficiency of Evidence.—Evidence considered, and found to justify a verdict for a reduced amount. (Syllabus by the Court.)

Action by the Richey & Gilbert Company against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals from an order denying a new trial. Affirmed, on condition that remittitur be made.

C. W. Bunn and *Emerson Hadley,* for appellant.
Geo. C. Stiles and *John P. Devaney,* for respondent.

O'BRIEN, J. Plaintiff is a fruit merchant in the state of Washington; its principal depots being at Toppenish, where it has a warehouse and trackage on or adjacent to defendant's right of way, and at North Yakima, where it has warehouse privileges of a similar nature. This action is to recover for loss which plaintiff claims to have sustained through the failure of defendant to furnish it transportation facilities for certain apples which it desired to ship between October 10 and November 13, 1907.

*See foot-note of Oliver & Son *v.* Chicago, etc., Ry. Co. (Ark.), 32 R. R. R. 449, 55 Am. & Eng. R. Cas., N. S., 449.

†See last foot-note of Chicago, etc., Ry. Co. *v.* Planters' G. & O. Co. (Ark.), 31 R. R. R. 638, 54 Am. & Eng. R. Cas., N. S., 638.

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

The complaint contained 14 causes of action, some of which are evidently duplications; but in the aggregate the complaint alleged failure to transport 60,450 boxes of apples, to plaintiff's damage in the sum of $48,500, an average of a fraction more than 80 cents per box. The evidence contained in a record of 1,139 pages tends to show that on October 10, 1907, plaintiff notified defendant that it would require at Toppenish 2 cars per day, beginning with October 10th and continuing to October 31st, except Sundays, and 16 cars at North Yakima. From some time in October, up to and until the early part of November, the plaintiff by letter and telegram frequently reiterated its demand for cars. While several cars were furnished, they were insufficient to move all of the apples which plaintiff then had for shipment. On November 13th plaintiff had the following apples packed in boxes, and which it had been unable to ship because of the lack of facilities:

At Toppenish warehouse	6,730	boxes
In orchards (in vicinity of Toppenish)	3,099	"
Sunnyside and Granger (stations on defendant's road)	2,547	"
North Yakima	10,121	"
Total	22,497	boxes

The plaintiff claimed (a) that the apples on hand November 13th had deteriorated while awaiting shipment; (b) that the fruit in five cars shipped in October had, because of delay, deteriorated in value; (c) that on November 15th the market price of apples suddenly and materially declined. It is, as we understand, conceded that sufficient facilities were furnished or tendered by defendant upon November 15th, so that the period during which the damage is claimed to have occurred extends from October 10th to November 15th. It appeared upon the trial that the total number of cars demanded by the plaintiff for North Yakima was 16, 10 of which were furnished. The 6 cars lacking would have contained 3,900 boxes. The court submitted to the jury plaintiff's claims to the following:

Toppenish warehouse	6,730	boxes
In orchards	3,099	"
Granger and Sunnyside	2,547	"
North Yakima	3,900	"
Total	16,266	boxes

In addition thereto the claim of deterioration on 5 cars shipped in October, amounting to $1,716.70. The jury found for the plaintiff in the sum of $21,588, which included interest to January 30, 1909. A new trial was ordered, unless the plaintiff consented to a reduction of the verdict to the sum of $16,476; the court deducting from plaintiff's claims any damages on account of the apples at Granger and Sunnyside, and any claim

for deterioration in the apples at North Yakima. The plaintiff consented to the reduction, and defendant appeals from the order denying a new trial. There is thus left for consideration plaintiff's claims as to 13,729 boxes, distributed as follows: Toppenish warehouse, 6,730; orchards, 3,099; North Yakima, 3,900; and the five car loads of apples shipped in October.

The errors assigned upon this appeal may be considered under the following heads: (1) Is the evidence sufficient to show a failure on the part of the defendant to furnish reasonable transportation facilities? (2) Does the evidence show a sufficient tender of the apples, and particularly as to those in the orchards at Toppenish? (3) Was the jury instructed as to the proper measure of damages? (4) Is the evidence sufficient to sustain the finding as to the amount of plaintiff's damage?

1. It is not contended that the defendant, prior to November 15, 1907, furnished the plaintiff with the cars demanded, or with those actually required by it. The defendant does insist, however, that it did all that could be reasonably expected of it. It appears that about October 1st defendant was notified of plaintiff's requirements. A great deal of evidence was introduced by both parties for the purpose of showing what cars were furnished, as well as what could have been furnished had defendant used due diligence. This question of fact was fully and fairly submitted to the jury, which determined the issue in plaintiff's favor.

2. The rights and duties of the parties to this controversy must be determined with reference to actual conditions and to the usual methods of transacting business, and a consideration of these leads unavoidably to the conclusion that the plaintiff had the right to demand cars for the shipment of its fruit, and that it made a sufficient tender of the apples upon which the verdict as reduced was based. It is not necessary to discuss defendant's duty as a common carrier to furnish to the public reasonable and ordinary facilities. What are reasonable facilities depends upon the ordinary and usual course of business at the time to which the inquiry is directed. The plaintiff maintained a warehouse at or adjacent to defendant's right of way at Toppenish, to which the defendant had extended trackage facilities. We do not understand, either from defendant's answer or the testimony, that there was anything unusual or improper in plaintiff's demand for cars, except as to the number demanded; but defendant claims that, because of the unexpected volume of business generally, it was unable to furnish a greater number of cars than it actually did. This can only mean that the reason all of these apples were not actually shipped before November 15th was because of defendant's failure to furnish cars, and its excuse for this failure is, not because of any conduct upon plaintiff's part, but because the general demand was so overwhelming that de-

fendant was unable to do more that it did. The fruit was gathered, boxed, and ready for shipment, and any additional or other tender of it to the defendant could serve no useful purpose. Every merchant, as well as every producer, upon a line of railroad, is to a greater or less extent dependent upon it for an opportunity to carry on business, and when a merchant follows the usual and regular course in preparing for the shipment of merchandise, and in notifying the carrier of his requirements, it would, we think, be a grievous wrong to say that in addition he should go through the empty form of bringing each package to the defendant's freighthouse and demanding its immediate shipment. This applies, not only to the warehouses at Toppenish and North Yakima, but also to the 3,099 boxes in the orchards in the immediate vicinity of Toppenish. These were also boxed and ready for shipment. The testimony indicates that the warehouse was completely filled shortly after October 10th. Had the apples in the warehouse been shipped, those in the orchards would have immediately taken their place. The jury found that the defendant negligently failed to furnish the facilities which, under the circumstances, it was required to furnish, and we conclude the plaintiff may recover his loss upon the apples so in the orchards, boxed and awaiting shipment.

We find nothing in the principal authorities cited by counsel for defendant antagonistic to this conclusion. It is, of course, true that before one can claim damages from a common carrier, either for refusing or delaying a shipment, it must appear that a tender was made of the articles to be shipped, and that the shipper was then ready and able to perform his part of the contract; but what constitutes such tender must depend upon all the circumstances. Elliott on Railroads, §§ 1475-1477; Hutchinson on Carriers (3d Ed.) § 1370; Little Rock & Ft. Smith R. Co. v. Conatser, 61 Ark. 561; Wilder *v.* J. & L. R. Co., 66 Vt. 637, 30 Atl. 41. The Wilder Case, above cited, was where an action was brought to recover damages for a refusal by the carrier to transport coal. The plaintiff was the surviving partner of a firm which had been engaged in the coal business and had transported coal over defendant's road. Because of a dispute the railway company announced that it would not in the future transport coal for this firm. The superintendent of the carrier stated that, if tendered a boat load of coal, he would not take it nor transport it, but would send it back into the lake. A majority of the court held that this did not dispense with the necessity of a tender of the property for transportation; but in the opinion, at page 639 of 66 Vt., and page 41 of 30 Atl., it is said: "It is evident that the case we have is not the case that would have been presented if the conversation relied upon had related to some specific property then upon the line of the defendant's road awaiting shipment, or in transit over a connecting road, or even

to some distinct proposal depending upon the defendant's service. It is not necessary to consider what the plaintiff's rights would have been in either of the cases stated." If just conclusions are to be reached, courts must give practical construction to legal rules and adapt them to commercial customs; and we find here the tender was sufficient as to the apples finally considered by the trial court.

3. No definite destination was fixed by plaintiff for the cars demanded. At most the defendant was notified that the cars were required for shipment to Montana and Eastern points, and because of this fact the defendant claims that the court erred in receiving evidence as to the decline in the market price at various Eastern points, and in permitting evidence that plaintiff intended to ship some of the apples to those points. Early upon the trial counsel for plaintiff contended that the proper measure of damages was the difference between the value of the fruit in Washington, when it was offered for shipment, and its value there in November, when the defendant was ready to receive it. Counsel for defendant insisted that such was not the proper measure, but, as we understand their position, that the proper measure would be the difference in the market price at the point of destination, if any such destination had been fixed, but that, inasmuch as no destination had been named by the plaintiff for any of the apples, the difference in the market price at particular Eastern points could not be given. The result of this would be that, while it might be apparent plaintiff had suffered loss, there would be no way by which the amount could be determined.

When a carrier receives goods for shipment, it contracts to deliver them within a reasonable time at a certain destination, and if it fails to perform its contract, and loss results to the shipper, the amount of the loss is based upon the value of the property at the point of destination. In this case no contract was entered into. The action was not for a breach of contract, but was, as to the fruit not shipped, in tort for the failure of the defendant to perform a duty resting upon it as a common carrier. Evidence was received as to the market value in Washington, and also at various Eastern points, upon those different dates. Some of the evidence indicated a general relation between all markets, and that the greatest difference arose from differences in freight charges. But, be this as it may, the defendant cannot complain, as the court in its charge directed the jury, if they found from the evidence "* * * that the apples after November 13th were of greater value at Toppenish and North Yakima than at said points of destination, then you will adopt that value as the basis for any estimate of decline in prices and resulting damage." The effect was to limit the plaintiff's recovery to a measure which would be most favorable to the defendant; that is, the

jury were instructed to take as one extreme the market price at Toppenish and North Yakima when the shipment was tendered, and estimate the loss upon the difference between that price and the highest market price on November 13th, whether found to be highest at Washington or elsewhere. The learned trial judge gave this instruction, as he explained to the jury, "because, as already stated, the plaintiff is only entitled to recover its actual loss, and any method of computing damage that would give greater than the actual loss or damage would be improper."

We are convinced that what the plaintiff was entitled to was the difference in the actual market value of the apples at the point of shipment at the time they were offered, as disclosed by the testimony, and their actual market value at the same place on November 13th or 15th, when the shipping facilities became available. So long as no contract of shipment had been entered into, it is impossible to say what was the point of destination. Indeed, we do not understand from the testimony that any particular destination had been determined upon by the plaintiff for any particular car load of apples. It is a common custom for freight of this character to be sold while actually in transit, and such car loads are constantly diverted from their original destination, so as to get the greatest possible advantage from the markets. The demand by the plaintiff for cars in which to ship its fruit to Montana and Eastern points we have already said was sufficient to make it the duty of the defendant to furnish those cars if reasonably possible; but in the absence of an actual shipment, billed to a particular destination, we think it would be a mere speculation to attempt to say where the fruit would have gone had it actually been shipped. Upon the other hand, the market value of the fruit when offered for shipment at the place where it was could be determined with certainty, as could also its actual market value at the same place on November 15th in its then condition. The difference in those values clearly measured the loss which plaintiff sustained by reason of defendant's default. If, while in the warehouse, the fruit had been destroyed by the wrongful act of some person, the loss would be determined by its value there. This we understand to have been the original position taken by the plaintiff; but when defendant objected to this evidence, and claimed that the market value at destination must be shown, evidence was introduced showing the market values at different points throughout the United States to which the fruit might have been shipped, had the defendant received it.

4. It remains to consider whether the evidence was sufficient to justify the verdict, if what we have stated to be the true measure of damages be applied. Defendant insists that under the

rulings of the court the damages have been duplicated; that by adding the depreciation in market price to the deterioration in condition double damages have been allowed. An examination of the evidence does not sustain this claim, at least to the full extent to which it was made. The testimony in many respects seems conflicting and difficult to reconcile. We have, however, concluded that there was testimony applicable to the measure of damages which we hold proper in this case, and that it is sufficient to sustain a verdict for a reduced amount. At page 675 of the paper book is found the following testimony by Mr. Gilbert, the president and manager of the plaintiff company: "Q. Did you not testify that the sound value of all your apples at North Yakima on the average was $1.98, or within a cent of that? A. At the time they were ready for shipment? Q. Yes. A. Yes; I think it was a little less than that, $1.97." As the prices at Toppenish, North Yakima, and in the orchards were practically the same, we assume that $1.97 per box was the average price of all the apples involved at the time they were offered for shipment, although a computation of other testimony of Mr. Gilbert, in which the prices are given in more detail, indicates an average somewhat lower. At page 722 Mr. Gilbert's testimony is given as follows: "Q. Now, at the risk of repetition, I will ask you to state, if you know, Mr. Gilbert, what was the fair and reasonable wholesale car lot market value of all these different varieties of apples on an average per box in the condition in which they actually were there at Toppenish, referring particularly to 6,730 boxes, marked at Toppenish November 15, 1907, as that condition and appearance of those apples was disclosed to you by your inspection, as shown by your testimony here, at or about that time? A. $1.20 per box. Mr. Hadley: Now, wait. Q. Do you know? A. I do know."

If from $16,476, the amount allowed by the district court upon the motion for a new trial, there is deducted the interest and the damage to the fruit in the five October cars, which would be, disregarding small fractions, $2,753, there would be left $13,723 as the loss upon 13,729 boxes, or almost exactly an average loss of $1 per box, while, as said, the average loss claimed in the complaint was 80 cents per box. But, if the computation be made upon the quoted testimony of Mr. Gilbert, which was directed to what we consider the proper measure of damages, we have a gross loss, both from deterioration and market decline, upon each box of apples at Toppenish warehouse and orchards, of 77 cents per box. The trial court held there was not sufficient evidence of any deterioration in the 3,900 boxes at North Yakima, the total loss of which, because of decline in North Yakima and Toppenish markets, would be less than 68 cents per box, and

is placed on page 34 of respondent's brief at $2,323.75. In addition, if we allow, as we think we must, the claim of loss upon the five cars shipped in October, we have the following:

6,730 boxes in warehouse at Toppenish at 77 cents	$ 5,182 10
3,099 boxes in orchards at Toppenish at 77 cents	2,386 23
3,900 boxes in warehouse at North Yakima	2,323 75
Loss on five cars in October	1,716 70
	$11,608 78
Interest from November 15, 1907, to date of verdict	812 61
Total	$12,421 39

It is therefore ordered that the order denying a new trial is reversed, unless the plaintiff, within 20 days after the remittitur from this court is filed in the district court, consents in writing that the verdict be reduced to the sum of $12,421.39, but that, if the plaintiff shall elect to consent to such reduction, the order denying a new trial be affirmed.

THOMAS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 25, 1910.)

[67 S. E. Rep. 908.]

Carriers—Shipment of Goods—Action by Consignee.—One who was required by a carrier to pay freight on goods represented in the bill of lading to be of a specified quality, and who was responsible for the goods, was properly considered as consignee for value or as one who had incurred liability as consignee, authorizing him to sue for any shortage.

On petition for rehearing. Dismissed.
For former opinion, see 64 S. E. 220.

PER CURIAM. After careful consideration the court fails to discover that any material matter of law or fact has been overlooked or disregarded.

The case, at folio 8, shows that the plaintiff was required by defendant to pay freight on the number of sacks of meal represented in the bill of lading without qualification to be 600, and, at folio 11, it appears that plaintiff was responsible for the meal. Hence the court was authorized to consider plaintiff as a consignee for value, or as one who had incurred loss and liability as consignee.

It is therefore ordered that the petition herein be dismissed, and the order heretofore granted staying remittitur be revoked.

MCMEEKIN *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, March 30, 1910.)

[67 S. E. Rep. 745.]

Carriers—Carriage of Goods—Connecting Carriers—Evidence—Presumptions.—A connecting carrier which has received a portion of a single shipment is presumed to have received the entire shipment.

Carriers—Carriage of Goods—Connecting Carriers—Limitation of Liability—Validity.*—A stipulation in a bill of lading that no carrier shall be liable for loss or damage not occurring on its own portion of the route is valid.

Carriers—Carriage of Goods—Loss—Failure to Adjust—Recovery of Penalty.—Where the court found that certain goods were never delivered to defendant, the terminal connecting carrier, and the bill of lading stipulated that no carrier shall be liable for loss not occurring on his line, defendant was not liable for a penalty under Act Feb. 23, 1903 (24 St. at Large, 81), providing for recovery of a penalty for failure to adjust or pay for loss or damage to property while in possession of a carrier.

Carriers—Loss of Goods—Liability of Connecting Carrier—Failure to Adjust Loss—Penalty.—Where the court found that goods were never delivered to defendant, a connecting carrier, the shipper could not recover penalty under Civ. Code 1902, § 1710, for failing to adjust the loss, because the bill of lading introduced as a contract of shipment did not provide that the responsibility of any carrier should cease on delivery to the connecting line in good order.

Appeal from Common Pleas Circuit Court of Fairfield County; J. C. Klugh, Judge.

Action by John C. McMeekin against the Southern Railway Company. From a judgment affirming the judgment of a magistrate in favor of plaintiff, defendant appeals. Reversed.

McCants & McCants, for appellant.
Ragsdale & Dixon, for respondent.

WOODS, J. In this action the circuit court affirmed the judgment of the magistrate in favor of the plaintiff, McMeekin, against the defendant, Southern Railway Company, for the value of a part of a shipment of flour and meal lost in the course of transportation from Estill Springs, Tenn., to Wallaceville, S. C., and for $50 penalty for failure to adjust and pay the claim within the time allowed by the statute. There was evidence

*See foot-note of Brunk *v.* Ohio & K. Ry. Co. (Ky.), 29 R. R. R. 279, 52 Am. & Eng. R. Cas., N. S., 279; foot-note of Moody *v.* Southern Ry. Co. (S. Car.), 28 R. R. R. 706, 51 Am. & Eng. R. Cas., N. S., 706.

tending to prove that the goods were lost before the shipment was delivered to the Southern Railway at Atlanta, and under this evidence the magistrate found as a fact that the goods were never delivered to the Southern Railway Company. This finding of fact was not disturbed by the circuit court.

A connecting carrier which has received a portion of a single shipment is presumed to have received the entire shipment. Bradley *v.* Northwestern R. R. Co., 77 S. C. 317, 57 S. E. 1101. But this presumption is eliminated in this case by the finding that the evidence of defendant's agent to the contrary was true. The bill of lading contained the stipulation that "no carrier shall be liable for loss or damage not occurring on its own portion of the route." Such a stipulation was held to be valid in Venning *v.* A. C. L. R. R. Co., 78 S. C. 42, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768. Hence the defendant was not liable for goods lost by a connecting carrier. From this finding of fact it also follows that the defendant was not liable for the penalty of $50 under the statute of 1903 (24 St. at Large, 81), which provides for the recovery of a penalty for failure to adjust and pay "for loss or damage to property while in the possession of such common carrier." Venning *v.* A. C. L. R. R., *supra.*

The plaintiff could not recover the penalty under section 1710 of the Civil Code, because the bill of lading introduced as the contract of shipment does not provide that the responsibility of each or any carrier shall cease upon delivery to the connecting line "in good order." Cave *v.* Carolina Midland R. R. Co., 53 S. C. 496, 31 S. E. 359; Venning *v.* A. C. L. R. R., *supra;* Mayfield *v.* Southern Ry. (recently filed) 66 S. E. 405.

The judgment of this court is that the judgment of the circuit court be reversed.

TUCKER *v.* PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 991.]

Carrier—Injury to Passenger—Questions for Jury.—Where a passenger, after alighting on a dark night, goes along a narrow elevated unlighted walk close to the track and in some way falls between the wheels of a passing car and is instantly killed without any actual witnesses of the occurrence, the question of negligence of the railroad company and decedent's contributory negligence is for the jury.

Carriers—Injury to Passengers—Evidence.—Though the death of a passenger was unwitnessed, where the circumstances are such as to satisfy reasonable minds that the accident resulted from the negligence of the carrier, liability attaches.

Appeal from Court of Common Pleas, Allegheny County.

Action by Fannie Tucker against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

L. K. Porter, S. G. Porter and *Frank H. Kennedy,* for appellant.

Wm. S. Dalzell, for appellee.

STEWART, J. Plaintiff's husband had been a passenger on a train that arrived at Gregg station at 10 o'clock on the night of August 10, 1907, coming from the east. Upon the arrival of the train he alighted from the rear end of the first car. To reach the public crossing that led to his home, he would have to face eastward and follow the platform or walk which the defendant had provided for the accommodation of passengers arriving or departing. This he evidently did, with a most unfortunate result, for, while he was thus walking along the track, the train started westward, and somehow or other he fell between the wheels of one of the passing cars and was instantly killed. This walk or path is spoken of by the witnesses as a platform. In fact, it was a walk covered with crushed limestone, extending along the railroad tracks for several hundred feet from the station eastward to the public road or crossing which was the approach to the station. Its level is 13 inches above the ties of the track, and its side next the track is supported and kept in place by a plank wall, leaving a space between the edge of the walk and the nearest rail of the track of the width of 2½ feet. The distance from the edge of the walk to the body of a car

occupying the track would be from 8 inches to a foot. The night was dark, and the walk was unlighted. Plaintiff's husband, while moving eastward to the crossing, was in advance of passengers who had alighted from the front of the same car. Two of these testified that, while they could observe people moving in front of them in the path alongside the train, it was so dark that they could not recognize them; that, an unusual sound attracting their attention, one of them lighted a match, and by the light thus supplied they discovered upon the track the remains of plaintiff's husband. As we understand the evidence, this occurred when they had passed about half the length of the second car. Both say that it was so dark that, although they were within a foot of the dead man, they could see nothing of him until the match was lighted. The negligence charged was failure to provide a safe and adequate platform or walk for passengers alighting and departing at nighttime.

The questions suggested by the case were: (1) Does the evidence show negligence on the part of the defendant? (2) Does it show that such negligence, if any, caused or contributed to the accident? And (3) does it show contributory negligence on the part of the person who was killed? We pass the first without remarking upon it further than to say that the question was for the jury. The second was just as certainly for the jury; but a word of explanation is here required. No one witnessed the occurrence, and, therefore, no one can testify how it did actually happen. The case is not very peculiar in this respect. Accidents in which life is lost not infrequently occur unwitnessed. Such fact in itself does not operate to protect one whose negligence can be shown from the general situation and circumstances to have been the operative cause. When these are such as to satisfy reasonable and well-balanced minds that the accident resulted from the negligence of the party charged, liability attaches. Such is the doctrine distinctly laid down in Allen *v.* Willard, 57 Pa. 374, a case which in its general facts bears close resemblance to this. So, too, was the third question for the jury. It was not negligence per se for plaintiff's husband to walk back along the platform when the train was moving. He was doing nothing unusual, but just what all the alighted passengers were doing and what, so far as the evidence disclosed, was customary. Whether it was negligence, under all the circumstances shown in the case, the jury alone could decide. The case calls for no further discussion here. The motion to take off the nonsuit should have prevailed.

The assignment of error is sustained, and judgment reversed, with a procedendo.

LOUISVILLE & N. R. CO. *v.* RONEY *et ux.*

(Court of Appeals of Kentucky, April 20, 1910.)

[127 S. W. Rep. 158.]

Carriers—Carrying Passenger Past Destination—Action—Evidence.—In an action for carrying a passenger past her destination, evidence of a miscarriage resulting from her difficulties in reaching home was not objectionable because notice of her condition was not brought home to defendant.

Carriers—Carrying Passenger by Destination—Action—Evidence.—In an action for carrying a passenger past her destination, evidence held to justify a finding that a miscarriage was the proximate result of a trip which she was compelled to take to reach home.

Appeal and Error—Review—Harmless Error—Evidence.—In an action for carrying a passenger by her destination, reversible error cannot be predicated on permitting her to testify that the conductor's manner was rude and insulting, where no instruction authorized punitive damages or, in fact, any damages on account of his manner.

Carriers—Carrying Passenger by Destination—Excessive Damages.—Where a woman is carried by her destination and is compelled to drive in the dark back to her home over a rough road, in company with a driver unacquainted with the road, and the road is so bad she deems it best for her safety to get out and walk, and she becomes nervous and sick, and suffers with backache, breastache, and bearing-down pains for several weeks, which finally end in a miscarriage, a verdict for $1,000 is not so excessive as to indicate passion and prejudice.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action by James Roney and wife against the Louisville & Nashville Railroad Company for carrying plaintiff's wife as a passenger past her destination. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. Carroll and *Benjamin D. Warfield,* for appellant.
Nat. W. Halstead and *Ben Chapeze,* for appellees.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 108 S. W. 343, 32 Ky. Law Rep. 1326. Upon the first trial appellee obtained a verdict for $500. Upon appeal to this court the judgment was reversed upon the sole ground that evidence to the effect that appellee suffered a miscarriage was permitted to be introduced without a plea of special damages. In remanding the case the court held that appellee could set up such special damages by amended petition. Upon return of the case an amended petition was

filed in conformity with our former opinion. The case was again submitted to a jury, which returned a verdict in appellee's favor for $1,000. From the judgment based thereon this appeal is prosecuted.

The evidence in brief is as follows: Appellee purchased a ticket for Lotus, a station in Bullitt county, and took passage on appellant's train for the purpose of reaching that point. As the train approached Lotus, appellee went to the door for the purpose of alighting when the train stopped. Some of the witnesses testified that the train did not stop at all; others that it stopped for such a short time that it did not afford appellee a reasonable opportunity to alight. Appellee was carried to Deatsville, a station beyond Lotus. Upon getting off the train, she got into a vehicle which had been provided for her by the railroad company for the purpose of reaching her home. The driver of the vehicle was an old man and not well acquainted with the road. The road was full of gullies and stumps, and part of it was very rough. As they proceeded on their way, appellee became frightened as it grew dark because of the fact that the driver did not know the way. As they neared appellee's home, the driver got out of the vehicle and began to walk in front of the horse. Fearing that the vehicle would be upset, appellee also got out and walked the remainder of the distance to her home. Appellee was taken sick that night, which was September 20, 1906. She suffered from backache, breastache, and bearing-down pains until the morning of October 9th, when she was taken with flooding spells, and suffered a miscarriage. During her illness she experienced great suffering. The evidence for appellant was to the effect that the train stopped at Lotus for a sufficient length of time to enable appellee to get off, that a number of others got off at that point, and that appellee could have done so had she made proper efforts. Finding that she had been carried by the station, the conductor arranged for a vehicle at Deatsville to take her home. The road from Deatsville was no worse than that from Lotus, which appellee would have been bound to take in order to reach her home.

It is insisted that the court erred in admitting evidence of the miscarriage because notice of appellee's condition was not brought home to appellant. The rule contended for by appellant is not the law in this state. The rule adopted by this court is set forth in the case of Southern Railway in Kentucky *v.* Miller, 129 Ky. 104, 110 S. W. 353, 33 Ky. Law Rep. 508, in the following language: "The fact that Miller was infirm or in a condition which aggravated the injury will not excuse the defendant from liability. The rule is thus stated in 3 Hutchinson on Carriers, § 1432: 'If the passenger at the time an injury is received through the negligence of the carrier is suffering from some disease or illness which tends to aggravate the injury, the pas-

senger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity, and the fact that the carrier was not informed of the passenger's condition will make no difference. Where a female passenger fell and was injured through the carrier's negligence while alighting from a passenger car, it was held that the fact that she wore an artificial limb which greatly aggravated the injury would not relieve the carrier from making full compensation for the real injury suffered. So, where a female passenger who was pregnant was injured in a collision of cars, it was held that the carrier was liable for the injury notwithstanding the fact that had she not been pregnant she would not have been injured.'" See, also, the case of Louisville & Nashville R. R. Co. *v.* Daugherty, 108 S. W. 336, 32 Ky. Law Rep. 1392, 15 L. R. A. (N. S.) 740, wherein this court quoted with approval the case of Brown *v.* Chicago R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41, where a pregnant woman was put off of a railway train at the wrong place, and the exertion of walking home brought on a sickness, and it was held that the railway company was liable for the full damage, although the servants in charge of its train and who put her off did not know the state of her health.

It is next argued that the evidence was not sufficient to justify the conclusion that the miscarriage resulted from the fact that appellee was carried by her destination and compelled to ride home. In support of this position the evidence of a physician who testified is referred to, where, in answer to a hypothetical question as to whether or not the circumstances detailed in the question were sufficient to cause the miscarriage, he answered "possibly." This, however, is not the only evidence bearing upon the point. It is shown that appellee was taken sick that night with backache, breastache, and bearing-down pains, and that these were premonitory pains and indicated a likelihood of a miscarriage. As this occurred immediately after the trip which she was compelled to make, and continued, though at times she was somewhat better, up until the date the miscarriage occurred, we cannot say that the finding of the jury that the miscarriage was the proximate result of the trip was based upon no evidence, or was flagrantly against the evidence.

It is also contended that the court erred in permitting appellee to testify that the manner of Conductor Wright was rude and insulting. In this connection the exact language employed is set out, and it is insisted that the language itself does not support the opinion of the witness that the conductor was rude and insulting. In this connection we are referred to the case of Louisville & Nashville R. R. Co. *v.* Summers, 118 S. W. 926. In that case, however, we held that such evidence was admissible, but that it was not sufficient to justify an instruction authoriz-

ing punitive damages in the absence of facts tending to show that the manner of the conductor was rude or insulting. Because punitive damages were allowed, the case was reserved. In the case under consideration, no instruction was given authorizing the recovery of punitive damages, or, in fact, any damages on account of the manner of the conductor. It is manifest, therefore, that the rule announced in the case of Louisville & Nashville Railroad Co. *v.* Summers, *supra,* does not support appellant's contention. Where a woman is carried by her destination, and is compelled to drive in the dark back to her home over a rough road, in company with a driver who is not acquainted with the road, and the road is so bad that she deems it best for her own safety to get out of the vehicle and walk a portion of the way, and she becomes nervous and sick, and sufferers with backache, breastache, and bearing-down pains for several weeks, which finally end in a miscarriage, we cannot say that a verdict for $1,000 is so excessive as to strike us at first blush as being the result of prejudice or passion on the part of the jury.

Other alleged errors are discussed in appellant's brief, but we do not deem them of sufficient importance to justify a reversal of this case.

Judgment affirmed.

USURY *v.* WATKINS *et al.*

(Supreme Court of North Carolina, April 20, 1910.)

[67 S. E. Rep. 926.]

Carriers—Injury to Passenger—Sudden Jolts.*—If the engineer of a train was not negligent in starting it with a jolt so that a passenger was thrown down and injured, the railroad could not be held liable for the injury resulting from such act; the train being properly equipped with air brakes, and the engineer being competent.

Carriers—Passenger on Freight Train—Assumption of Risk.†—In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains when managed by prudent and competent men in a careful manner.

Appeal from Superior Court, Granville County; Biggs, Judge.

*See first foot-note of Boston Elev. Ry. Co. *v.* Smith (C. C. A.), 32 R. R. R. 551, 55 Am. & Eng. R. Cas., N. S., 551; last foot-note of Norfolk & W. Ry. Co. *v.* Rhodes (Va.), 31 R. R. R. 417, 54 Am. & Eng. R. Cas., N. S., 417.

†See last paragraph of last foot-note of Math *v.* Chicago City Ry. Co. (Ill.), 34 R. R. R. 206, 57 Am. & Eng. R. Cas., N. S., 206; first foot-note of Arkansas Cent. R. Co. *v.* Janson (Ark.), 32 R. R. R. 481, 55 Am. & Eng. R. Cas., N. S., 481.

Usury *v.* Watkins

Action by S. H. Usury against M. L. Watkins and the Southern Railway Company. Judgment for plaintiff as against the railway company, which appeals. Reversed.

Action for personal injury against defendant Watkins as the engineer and the Southern Railway as the common carrier operating a freight train with passenger coach attached between Oxford and Keysville, tried at November term, 1909, of the superior court of Granville county. Plaintiff was a passenger, and, while standing up near car door when train had stopped at a water tank, the train was started, and, as plaintiff testifies, he was thrown down and injured. At conclusion of all the evidence plaintiff stated he did not desire or ask that an issue be submitted as to engineer Watkins. There was a verdict and judgment against the defendant railway company from which it appealed.

T. T. Hicks and *A. A. Hicks,* for appellant.
B. S. Royster, for appellee.

PER CURIAM. The assignments of error present two questions:

(1) Is there any sufficient evidence of negligence?

(2) In view of the action of plaintiff in respect to the defendant Watkins, can plaintiff recover of his principal the railway company?

We are unanimous in the opinion that there is no sufficient evidence of negligence, and that his honor should have so held. The train was a long freight with passenger coach attached at end. It was properly equipped with air brakes, and managed by a competent engineer. In starting the train and taking up the slack, it is conceded that much jolting and jarring is inevitable. We do not think the evidence is sufficient to show that the jolting complained of was due to the negligence of the engineer, or could have been reasonably avoided in starting so long a train, or that the engineer managed the train in a negligent manner. We are somewhat confirmed in this view by the action of the plaintiff at the close of the evidence, who was manifestly unwilling to ask a verdict against the engineer Watkins upon the evidence. If the engineer was not guilty of negligence, then upon the evidence of this case the employer could not be held. Smith *v.* Railroad, 151 N. C. 482, 66 S. E. 435. We recur to what is said in Marable *v.* Railway, 142 N. C. 557, 55 S. E. 355. "In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains, when managed by prudent and competent men in a careful manner." We see nothing that takes this case out of this rule.

In this view, it is unnecessary to consider the second ground so elaborately discussed before us.

Error.

COON *v.* ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas, April 9, 1910.)

[108 Pac. Rep. 85.]

Carriers—Injuries to Passengers—Contributory Negligence—Passing Between Train and Station.—Persons carried on a freight train on which their live stock is in transit, in going to and fro between the caboose and a depot, are not absolved from the duty of looking and listening when about to cross an intervening track, their obligation in that respect being greater than that of persons passing back and forth between a station platform and a passenger train that has stopped to receive and discharge passengers.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.—In a personal injury action against a railway company there was evidence tending to show these facts: The plaintiff accompanied live stock in shipment; he was told to wait at a depot until a train arrived to which his cars were to be attached, and to be ready to take it there at any time; he saw it approaching on a track 60 feet away, and started towards it; in crossing an intervening track he was struck by a switch engine which was running three or four miles an hour, receiving the injury on account of which he sued; a shadow prevented the engine being visible to him until it had reached a point within 45 feet of the place of the accident, after which he could have seen it if he had looked, but he failed to do so. Held, that whether under the circumstances his failure to look constituted contributory negligence was a question of fact for the jury.

(Syllabus by the Court.)

Appeal from District Court Elk County; G. P. Aikman, Judge.

Action by S. A. Coon against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. R. Smith, O. J. Wood and *A. A. Scott,* for appellant.
Jackson & Darby, for appellee.

MASON, J. The Atchison, Topeka & Santa Fé Railway Company appeals from a judgment in a personal injury action brought against it by S. A. Coon. So far as material to the questions of law presented the facts according to his testimony and the findings of the jury were as follows: He accompanied two cars of stock which he shipped from Howard to Kansas City, riding on a drover's pass. At about 8 o'clock in the evening he reached Emporia, where his cars were to be attached to a train from the west which had not yet arrived. The conductor told him to wait at the depot, and he did so for more than an hour. He asked the train dispatcher when the train would be along, and was told to look for it at any time and to be there and ready to

take it, as it would only wait about a minute. Presently he saw his train approaching and started for the track on which it was running, so as to take the caboose when it should be opposite the depot. This track was 60 feet from the door of the waiting room, and to reach it he had to cross another track which was about 20 feet nearer. As he was crossing this nearer track he was struck by the tender of a switch engine backing in from the east and received the injuries on account of which he sued. By the light of an arc lamp he could have seen the tender if he had looked toward it after it had reached a point 45 feet from the place of the accident. Beyond that limit the track was obscured by a shadow. The speed of the engine was not found, and estimates of witnesses varied from three or four miles an hour to as fast as a man could run.

The questions presented relate to contributory negligence. The principal objection to the judgment is based upon a portion of an instruction reading as follows: "A passenger in necessarily traveling from a depot to reach his train, and who is compelled to cross an intervening railway track belonging to the company over the road of which he is traveling as a passenger, if going the direct route and at the proper time and to take the proper train for him, is not compelled to look or listen before going over the track." In so charging the jury the trial court applied to the facts of this case the rule declared in Railway Co. *v.* McElroy, 76 Kan. 271, 91 Pac. 785, 13 L. R. A. (N. S.) 620, 123 Am. St. Rep. 134, the substance of which is that persons passing back and forth between a depot platform and a passenger train which has stopped to receive and discharge passengers are relieved from the obligation to look for an approaching train before crossing an intervening track. Many courts reject the rule in this form, holding that while a failure to look under such circumstances is not negligence as a matter of law, the jury may decide it to be negligence as a matter of fact. See notes to the McElroy Case, in 13 L. R. A. (N. S.) 620, and 123 Am. St. Rep. 137; also Birmingham Ry., etc., Co. *v.* Landrum, 153 Ala. 192, 45 South. 198, 127 Am. St. Rep. 25, and Dieckmann *v.* Chicago & N. W. Ry. Co. (Iowa) 121 N. W. 676. We are aware of no instance of the application of the rule to passengers on a freight train, and do not think it can properly be so applied. A freight train carries passengers only incidentally. Irregularity is to be expected in the time of its arrival at a station, the duration of its stay, and its location during the interval. A person riding upon it for the purpose of caring for stock in transit may justly be required to take precautions for his own safety while going to and from the caboose that are not exacted of one passing between a depot platform and a passenger train. "It is obvious * * * that the precautions required of railway companies carrying passengers on freight trains, in affording them

safe and convenient means to get on and off such trains, are not the same as those which are demanded in the case of passenger trains." Thomp. Com. on L. of Neg. § 2904.

If the engine which caused the injury was running at the rate of only three or four miles an hour, there was a considerable interval after it had emerged from the shadow in which by looking in that direction the plaintiff could have seen it before attempting to cross the track. Whether his failure to look at that time constituted negligence was the vital question in the case. By instructing the jury that one in his situation was absolved from the duty of looking, the trial court took this question from them and answered it in the negative. The remainder of the instruction did not in this respect modify the effect of the part already quoted. It read: "But nevertheless it is his duty upon arriving at the track to cross over it if there is no apparent danger, and he has no right when knowingly upon such track to linger thereon and neglect to use his judgment and faculties and close his mind and reason to all sense of danger, and if he does carelessly and negligently linger on the track, or carelessly and negligently walk along between the rails, and an injury follows to him by reason of such carelessness and negligence, when if he had used reasonable care he would not have been injured, then in such case he cannot recover." This allowed the jury to find that the plaintiff was chargeable with contributory negligence in having lingered on the track or in having walked between its rails, but not in having failed to look before attempting to cross it.

The railway company also contends that the court should have instructed, in substance, that, if by looking up the track just before attempting to cross it the plaintiff could have seen the approaching engine, his failure to do so would bar a recovery. A case might arise in which a passenger on his way to the caboose of a freight train would be held to the same requirements that are imposed upon a traveler seeking to cross a railroad at a highway, but we do not think the situation here presented justifies so rigid a rule. The plaintiff's shipping contract contained these provisions, among others, regarding his conduct: "Will not be upon or attempt to cross any track while switching is being or is about to be done thereon, but will first use every effort to ascertain whether it is safe to go upon or cross such track or tracks. Will be advised that freight trains do not stop at stations or other places where it is usually made safe to alight from trains, * * * and will therefore not attempt to alight from the caboose or car * * * without first making careful examination * * * and first determine * * * that it is safe to step down." These agreements serve to illustrate how the attitude of the passenger is affected by the character of the train on which he rides, but we do not perceive that they have a direct

bearing upon the plaintiff's obligations under the facts already stated.

The judgment is reversed and a new trial ordered. All the Justices concurring.

DENVER & R. G. R. CO. *v.* DERRY.

(Supreme Court of Colorado, April 4, 1910.)

[108 Pac. Rep. 172.]

Carriers—Injuries to Passenger—Riding on Pass.—A carrier cannot claim that its liability for injuries to a passenger was only that which was due to one riding on a pass because the passenger had a ticket issued by the railroad to another, and by him given to the passenger, since it would be presumed in the absence of contrary evidence that the company received consideration for it.

Carriers—Infirm Passengers—Duty to Receive.*—A carrier is not bound to receive as a passenger one who is helpless or blind or otherwise incapable of properly caring for himself unless accompanied by a competent attendant.

Carriers—Infirm Passengers—Care Required by Them.—The care to be observed by one who is blind, traveling alone on railroad trains, is greater than that required of one without such infirmity.

Carriers—Infirm Passengers—Care Required.*—Where a carrier accepts a blind man without an attendant as a passenger, it must use at least reasonable care and diligence for his safety.

Carriers—Negligence of Carrier—Contributory Negligence—Question for Jury.—In an action for injuries to a blind passenger, whether the passenger was negligent, and whether the employees of the carrier were negligent, held, under the evidence, for the jury.

Carriers—Blind Passenger—Contributory Negligence.†—Where a blind passenger asked a Pullman porter, telling him that he was blind, to assist him into a sleeping car, and the porter took hold of his arms and put him on the steps, plaintiff was not negligent in feeling his way along the car up the steps until he reached what he thought was a door but which was in fact the open space on the other side of the car, whereby he fell and was injured, since he was entitled to con-

*See first foot-note of Illinois Cent. R. Co. *v.* Allen (Ky.), 20 R. R. R. 149, 43 Am. & Eng. R. Cas., N. S., 149; foot-note of Mercer *v.* Cincinnati Northern R. Co. (Mich.), 28 R. R. R. 615, 51 Am. & Eng. R. Cas., N. S., 615; foot-note of Sullivan *v.* Seattle Elec. Co. (Wash.), 32 R. R. R. 163, 55 Am. & Eng. R. Cas., N. S., 163.

†See last paragraph of last foot-note of St. Louis, etc., Ry. Co. *v.* Oliver (Ark.), 34 R. R. R. 191, 57 Am. & Eng. R. Cas., N. S., 191; first head-note of Illinois Cent. R. Co. *v.* Daniels (Miss.), 34 R. R. R. 196, 57 Am. & Eng. R. Cas., N. S., 196.

clude that the porter, knowing of his infirmity, would watch him and guide his movements.

Carriers—Sleeping Cars—Employees—Liability of Carrier.‡—When a sleeping car which belongs to a separate corporation is attached to and becomes part of the train of a railroad company, the employees of the sleeping car company are, as to the passengers of the railroad company riding on the sleeping car, to be regarded as employees of the railroad company for whose negligent acts the railroad company itself is liable.

Carriers—Detached Sleeping Cars—Injuries to Passenger—Negligence of Employee.—With the knowledge of a railroad company, it was customary for a sleeping car company to have its sleeper ready for passengers of the railroad company before the train to which it was to be attached arrived. A blind passenger, having a through ticket, changed cars at a station where a sleeping car was ready and having a berth therein, the porter of the train on which he had arrived took him over to the porter of the sleeping car who was informed of his blindness, and through his negligence the passenger was injured while attempting to go to his berth. Held, that the porter of the sleeping car was an employee, as to the passenger of the railroad company, and it was liable for the injury, though the sleeping car was not attached to any train.

Carriers—Injuries to Passenger—Changing Cars—Continuing Duty.§—The passenger was at all times a passenger, since there is a continuing duty on the carrier to provide the passenger safe passage from the train to the depot, and from the depot to the sleeping car.

Appeal from District Court, Chaffee County; Morton S. Bailey, Judge.

Action by Robert J. Derry against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Vaile & Waterman, Elroy N. Clark and *C. A. Chamberlin* (*Wm. W. Field,* of counsel), for appellant.

Potter & Banks (*Floyd F. Walpole,* of counsel), for appellee.

CAMPBELL, J. From a judgment rendered against the defendant railroad company in favor of plaintiff, Derry, as compensation for personal injuries suffered by him as the result of the negligence of its employees, this appeal is prosecuted. Derry is, and for many years has been, totally blind. He is a merchant living in Ouray, Colo., and often traveled upon defendant's railroad in carrying on his business, and was well known to defendant's conductors and trainmen, who were aware of his in-

‡See last foot-note of Campbell *v.* Seaboard A. L. Ry. (S. Car.), 33 R. R. R. 230, 56 Am. & Eng. R. Cas., N. S., 230.

§ See first foot-note of Powers *v.* Connecticut Co. (Conn.), 34 R. R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

firmity. He boarded defendant's train at Ouray, Colo., for a journey to Denver, having a round-trip first-class railroad ticket. The first part of the journey was by a narrow gauge train from Ouray to Salida. The second part by a standard gauge train from Salida to Denver. At Salida, through passengers left the narrow gauge train, which arrived about 8:30 p. m., and had to wait there about an hour and half for a through train from the West, which carried the narrow gauge passengers thence to Denver. At Montrose, en route to Salida, plaintiff bought of defendant's agent a berth, which entitled him to accommodations in a Pullman palace sleeping car, which, though owned by another company and managed and cared for by its own employees, was to be attached to, and form part of, defendant's train from Salida to Denver. It was customary for defendant to carry on its westbound trains from Denver a standard gauge sleeping car, which was taken off at Salida and left standing near the depot on one of defendant's tracks in its yards, to be attached to defendant's east-bound train leaving Salida for Denver about 10 o'clock at night. Defendant's train reached Salida on schedule time. He alighted therefrom, with the help of the porter of the train, having previously requested the porter to take him to his sleeping car, and stood waiting by the side of the car until the porter had finished his duties in connection with assisting other passengers. It was a general custom of defendant, or the Pullman employees, with which the traveling public, including plaintiff, was familiar, to open this sleeping car and have it ready for the reception of passengers from the narrow gauge train destined to Denver, and who were supplied with tickets therefor, immediately upon their arrival, without requiring them to sit in the railway station or depot till the arrival of the connecting train from the West. Whether this custom was adopted by the sleeping car company upon its own initiative, or at the request of the railroad company, is not important. It was known to and recognized by the railroad company, and there is no evidence that it ever had objected thereto. Upon the night in question, after all the passengers had alighted from the narrow gauge car upon its arrival at Salida, and defendant's train porter had finished his duties in connection therewith, in compliance with the previous request, he assisted plaintiff and accompanied him to the sleeping car, which was, as usual, standing on a side track and ready for ticket holders, and which was to be attached to and form a part of defendant's east-bound train to Denver upon its arrival from the West, and the train porter delivered plaintiff to the Pullman porter, who was standing by its steps, at the end where the passengers were to enter, with a lighted lantern in his hand, ready to assist passengers supplied with berth tickets. There is some question as to whether the Pullman conductor was present. However that may be, the Pullman porter was informed by the

plaintiff himself that he was blind, and a request was made of him by plaintiff in which another person present joined, for assistance into the car. The Pullman porter took hold of plaintiff's elbows and assisted him upon the lower step of the platform leading into the sleeping car. Plaintiff was carrying his overcoat thrown over his left arm and carrying his hand bag in his right hand. Believing, as he says, that the passageway into the car was safe and unobstructed, and supposing that he was being watched and guided by the Pullman porter, plaintiff proceeded up the steps, feeling his way along as best he could. When he reached what seemed to him to be the proper opening from the platform into the car, he stepped into the same, but it proved to be the passageway from the end of the platform away from the door of the car instead of into it, the same having been left open and not closed by a gate as was the usual custom at such times. The result was that plaintiff fell violently between the tracks and received the injuries to his arm for which he asks compensation in this action. The particular acts of negligence upon which he relies, as stated in the complaint, are that the Pullman porter, knowing of his infirmity, did not accompany him up the steps and into the car, or watch and guide his movements, and that defendant, through its employees, was negligent in that the gate was not closed, which, had it been in its proper place, would have prevented him from stepping from the front, or end, of the platform of the car.

As a preliminary objection, defendant, upon this review, contends that its liability to plaintiff is only that which was due him as a passenger riding on a free pass, which relation thereby created, if it does not entirely relieve defendant of all liability for negligence, imposes a duty different from that which rests upon it towards a passenger for hire. The record does not present such a case. Plaintiff had in his possession a first-class round-trip ticket from Ouray to Denver on defendant's road. He did not himself purchase this ticket or pay the railroad company directly therefor. It was issued, however, by the railroad company to another person and by him delivered to plaintiff. Whether the railroad company received a consideration for the ticket the record does not disclose, but, in absence of proof to the contrary, we are entitled to presume that it did. Counsel are mistaken in supposing that they made an offer to show the nature of the transaction concerning the ticket, or that a claim was made below that the ticket was issued by the company and received by plaintiff as a gratuity. The case therefore is as if plaintiff was a passenger for hire. The agents of the railroad company took his ticket when he presented it for passage, and he was entitled to the care and protection which the contract for carriage, evidenced by the ticket, gave him.

It may be that a railroad company is not bound to receive as

a passenger one who is helpless or blind, or otherwise incapable of property caring for himself, unless accompanied by a competent attendant. It may also be true that the care to be observed by one who is blind, traveling alone upon railroad trains, is greater than that required of one without such infirmity. But when the railroad company accepts as a passenger one whom it knows to be incapable of taking proper care of himself, and who has no attendant, it must certainly use at least reasonable care and diligence for his safety, and, if it fails to do so, it is negligent. Hanks *v.* C. & A. Ry. Co., 60 Mo. App. 274. No greater, or different, liability was imposed on defendant at the trial.

The objections to the rulings of the court in admitting and rejecting evidence and certain alleged rulings upon the pleadings and to the verdict are not of sufficient importance to merit separate discussion. If there was no error with respect to the assignments of negligence of defendant, and of contributory negligence of plaintiff, and to the rulings and instructions of the court with reference to the liability of defendant for the acts of employees of the sleeping car company, none of the other rulings of the court constitute error.

We discuss the questions of negligence together. It is said by defendant that plaintiff, knowing of his physical infirmity and of the dangers attending his movements in getting upon the car, was guilty of contributory negligence in attempting to enter the car without the active and continuous assistance of the Pullman porter; and it is further said, but not very seriously argued, that negligence on the part of the Pullman porter was not established. Whether or not, in the circumstances disclosed by the evidence, negligence of defendant and contributory negligence of plaintiff was established was rightly submitted to the jury, which found against defendant upon both issues. We might rest the discussion of this assignment solely upon that proposition. We say, however, that, upon the uncontradicted evidence, the affirmative defense of contributory negligence was not proved. When plaintiff asked the Pullman porter to assist him into the car, and the latter took hold of his arms and put him upon the step, being blind, and the porter knowing it, plaintiff was justified in believing that the porter was watching his movements and would see that he did not step off the end of the car, but would pass safely through the open door and into the car to his seat. He might well conclude that the porter, knowing of his physical infirmity, would watch him closely and guide his movements either by a word of warning, or by being in a position where he could touch him and properly guide his movements. Putting it as mildly as the facts justify, we say, also, that the porter, knowing of plaintiff's blindness, was guilty of reprehensible negligence in suffering plaintiff to proceed up the

platform steps without even cautioning him, or watching him, or guiding his movements.

The chief ground relied upon for reversal is that the railroad company is not liable for the negligent acts of the employees of the sleeping car company. It is, of course, conceded that, under the doctrine of Penn. Co. *v.* Roy, 102 U. S. 451, 26 L. Ed. 141, when a sleeping car which belongs to a separate corporation is attached to, and becomes part of, the train of a railroad company, the employees of the sleeping car company are, as to the passengers of the railroad company riding in the sleeping car, to be regarded as employees of the railroad company, for whose negligent acts, which concern the safety of transportation of passengers, the railroad company itself is liable. But it is strenuously argued that the doctrine has not been, and cannot be, legitimately extended to the present case. To our minds the doctrine of the Roy Case is clearly applicable, and is but the logical extension of a recognized rule of master and servant. The contract between plaintiff and the railroad company, by which he was entitled to be carried from Ouray to Denver, was but partly performed when the narrow gauge train reached Salida. He certainly was a passenger up to the time he alighted from the train upon its arrival at that station. The journey, however, was incomplete, and a part of the contract was still to be performed. Had plaintiff been taken by defendant's train porter from the narrow gauge train to defendant's railway station or depot, he certainly would have been a passenger while going there, and would have continued to be a passenger all the time he was waiting there for the arrival of the east-bound train which would take him from Salida to Denver, the second stage of the journey. Since it clearly appears that, with the knowledge and tacit approval of the railroad company, the sleeping car company opened its sleeping car for the reception of passengers from the narrow gauge car immediately upon their arrival, which obviated the necessity of waiting in the railway station till the arrival from the West of the connecting train, and the porter of the sleeping car was standing at the platform steps with lantern in hand waiting to assist such passengers to enter the sleeping car, plaintiff was a passenger of defendant in going from the narrow gauge to the sleeping car, and during his movements in passing up the steps and into the car. Being a passenger, it was defendant's duty to take reasonable precautions for his safety and comfort. When defendant's train porter accompanied plaintiff to the sleeping car and turned him over to the Pullman porter, the latter, in assisting passengers into the sleeping car, was acting as the agent and employee of the railroad company in the same sense, and to the same extent, that he would be, had the sleeping car been actually attached to defendant's train after the train had been made up and was moving on the railroad tracks on its way

from Salida to Denver, because such act of assistance concerned the safety and transportation of a passenger. There is the same reason for saying that plaintiff was a passenger of defendant company from the moment of his arrival in Salida until the connecting standard gauge train from Salida to Denver started on its journey, as for saying that he was a passenger continuously between Ouray and Salida, or between Salida and Denver. The defendant was under the same obligation with respect to his safety throughout the entire journey as for any particular portion thereof. In D. & R. G. R. R. Co. *v.* Hodgson, 18 Colo. 117, 31 Pac. 954, and A., T. & S. F. R. Co. *v.* Shean *et al.*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729, this court has held that the duty of a common carrier does not cease upon the arrival of its train at the place of a passenger's destination, but there is a continuing duty resting upon the carrier in providing the passenger safe passage from the train to the platform of the depot. The same obligation, of course, rests upon the carrier in providing a safe passage for the passenger in going from the depot to the train to take passage thereon, and in and about the platforms, and, as in this case, in providing for his safety in going from one connecting train to another, which it is necessary for the passenger to do in order to complete his journey. We have no hestitation in extending the doctrine of the Roy Case to the case made by the evidence in the case in hand. We think the following authorities also in principle sustain our conclusion: 4 Elliott on Railroads (2d Ed.) §§ 1579, 1625, 1640; H. & S. F. J. R. R. *v.* Martin, 11 Ill. App. 386; B. & O. R. R. Co. *v.* State, etc., 60 Md. 449; Shannon *v.* Boston & A. R. Co., 78 Me. 52, 2 Atl. 678. See, also, 7 Rapalje & Mack's Digest of Railway Law, 140; Dwinelle *v.* N. Y. C. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611.

Affirmed.

STEELE, C. J., and MUSSER, J., concur.

SOUTHERN RY. CO. *v.* HARRINGTON.

(Supreme Court of Alabama, Feb. 26, 1910.)

[52 So. Rep. 57.]

Corporations—Personal Injuries—Actions—Place of Injury—Venue.—Under Code 1907, § 6112, requiring actions for personal injuries against a corporation to be brought in the county where the injury occurred or where plaintiff resides, if the corporation does business there, it is sufficient if the injury occurred partly within a county, in order to sue the corporation there.

Corporations—Actions—Venue—Personal Injuries—Residence of Plaintiff.—It is sufficient under Code 1907, § 6112, requiring actions for personal injuries against a corporation to be brought in the county where the injury occurred or where plaintiff resides, if the corporation does business there, if plaintiff resides in the county of the venue when the suit is begun against a corporation, though not at the time of the injury.

Carriers—Passengers—Relation—Carriage of Railway Postal Clerks.*—Mail agents, postal clerks, and express messengers are passengers on the train on which they ride while working, and while they cannot rely upon the contract between the carrier and the government to impose a liability on the carrier in their favor, they may rely upon the legal duty of one undertaking to perform even a gratuitous service to exercise the care which the nature of the undertaking requires.

Carriers—Passengers—Company's Duty—Equipment.†—A railroad company must warm its coaches for the safety and comfort of passengers, and its duty extends to mail cars in which postal clerks ride, in the absence of contract exempting them from doing so.

Carriers—Passengers—Injuries—Contributory Negligence.‡—A passenger cannot recover for illness caused by failure to heat the coach, if his contributory negligence proximately caused the injury, and the passenger's failure to protect himself from unnecessary cold or provide sufficient clothing may or may not be contributory negligence according to the circumstances.

Negligence—Contributory Negligence—Proximate Cause.—In determining the right to recover for personal injuries, the question is whether the damages were caused entirely by defendant's negli-

*See second foot-note of Chicago, etc., Ry. Co. *v.* Hostetter (Ind.), 30 R. R. R. 242, 53 Am. & Eng. R. Cas., N. S., 242; first foot-note of Lewis *v.* Pennsylvania R. Co. (Pa.), 30 R. R. R. 59, 53 Am. & Eng. R. Cas., N. S., 59; second foot-note of Birmingham, etc., Co. *v.* Savage (Ala.), 29 R. R. R. 779, 53 Am. & Eng. R. Cas., N. S., 779.

†See extensive note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154.

‡For the authorities in this series on the subject of the duty of a person injured by the negligence of another to minimize his damage, see first foot-note of White *v.* Chicago & N. W. Ry. Co. (Iowa), 34 R. R. R. 768, 57 Am. & Eng. R. Cas., N. S., 768.

gence or whether plaintiff's negligence so contributed to his injury that, except for such negligence, the injury would not have happened.

Carriers—Passengers—Injuries—Contributory Negligence.—Since a postal clerk is required by act of Congress to remain in the mail car while on duty, he is not prima facie guilty of contributory negligence precluding recovery for illness by remaining in the car knowing that it is so insufficiently heated as to be uncomfortable.

Carriers—Passengers—Actions—Admission of Evidence.—In an action by a railroad postal clerk against a railroad company for damages for illness caused by defendant's failure to heat its mail car, plaintiff could show that the car was wet and damp as tending to show that it would be uncomfortable.

Carriers—Passengers—Injuries—Actions—Admission of Evidence.—In an action by a railroad postal clerk for damages caused by illness due to working in an unheated car, plaintiff could testify as to his duties as postal clerk in the car and how long he was compelled to remain therein.

Carriers—Passengers—Injuries—Actions—Admission of Evidence.—In an action by a railroad postal clerk for damages caused by illness resulting from a railroad company's failure to heat a mail car, plaintiff could show that he complained to defendant of the unheated condition of the car to show actual notice.

Carriers—Passengers—Injury—Actions—Admission of Evidence.—In an action by a railroad postal clerk against a railroad company for damages resulting from illness caused by failure to heat the mail car in which plaintiff worked, evidence that plaintiff was a "chronic kicker" was properly excluded.

Carriers—Passengers—Injuries—Actions—Admission of Evidence—Irrelevancy.—In an action by a railroad postal clerk for damages caused by illness from failure to heat the mail car in which he worked, evidence as to the temperature of the express car in the same train was not relevant, where it appeared that the express and mail cars were heated differently in some respects, though each contained steam pipes from the engine, and the evidence showed that the mail car, was cold while the express car was comfortable.

Carriers—Injury to Passenger—Evidence—Other Actions.—In an action for damages by illness occurring on three days in January, defendant could not show that plaintiff brought another suit against it to recover for illness occurring thereafter in February.

Trial—Instructions—Requests—Applicability to Evidence.—In a passenger's action for illness caused by a railroad company's failure to heat the car, where there was no evidence that the illness was caused by insufficient clothing, a charge directing a verdict for defendant if it was so caused was properly refused.

Carriers — Passengers — Injuries — Pleading — Contributory Negligence—Necessity.—In an action by a railroad mail clerk for damages by illness because of a railroad company's failure to heat the mail

car in which plaintiff worked, defendant could not rely on plaintiff's contributory negligence in wearing insufficient clothing unless it was pleaded.

Appeal from Circuit Court, Walker County; A. O. Lane, Judge.

Action by C. F. Harrington against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The pleadings and the facts are sufficiently set out in the opinion of the court. The following charges were refused to the defendant: (1) "The court charges you that if you are reasonably satisfied from the evidence that plaintiff's injuries were proximately caused by inadequate clothing, worn by plaintiff, to meet the demands of the season and climate, you must find for the defendant." Charges 9 and 10 were the affirmative charges as to the third and fourth counts. (11) "The court charges you that if you believe from the evidence that the cold condition of the car, as complained of by the plaintiff, was due to unusual cold weather, and that plaintiff made no complaint to those in charge of the train, and made no effort to remedy or have remedied the condition of the car, you must find for the defendant." (12) "If you are reasonably satisfied from the evidence that the mail car was equipped with stoves sufficient to properly warm the car, and that sufficient fuel was placed in the car, the court charges you that it was the duty of the plaintiff, for his own protection to start or cause to be started the fire in said stove."

Bankhead & Bankhead, for appellant.
W. J. Martin, and *James A. Mitchell,* for appellee.

MAYFIELD, J. Appellee, a railway postal clerk, sues the defendant, railroad company, a carrier of the United States mail, for failure to properly heat or warm the car in which the mails were carried, and in which his duties required him to work and remain while on duty, as such postal clerk, by reason of which failure, on the part of the defendant, he was unduly exposed to the cold and was thereby made sick, had his feet frost-bitten, contracted severe cold, bronchitis, etc. The defendant attempted to plead contributory negligence and assumption of risk as a defense to the action, together with the general issue. However, the defendant first interposed a plea in abatement, for that the wrongs and injuries complained of did not wholly occur within the county of Walker, in which the action was brought, that plaintiff did not reside in Walker county at the time of the injury, the run in which plaintiff was engaged being from Birmingham, Ala., to Greenville, Miss., and that a part of the wrongs

and injuries complained of were committed and suffered, if at all, outside of Walker county, that of the venue. This plea was filed under section 6112 of the Code of 1907. A demurrer to this plea in abatement was sustained, which is the first assignment insisted upon as error.

The plea was open to the demurrer leveled against it. It is not required by the statute (Code 1907, § 6112) that the injury should have wholly occurred within the county in which suit is brought—partly therein is sufficient; nor is it necessary that plaintiff should have resided in the county at the time of the injury—at the time of bringing the suit is sufficient. The original complaint claimed damages in one count for wrongs and injuries suffered on three separate and distinct days, a demurrer being sustained to it for this reason. The complaint was amended by adding three counts, each claiming damages for the wrongs committed on one day only, though each count claimed as for a different day. Demurrers were interposed to the amended complaint and were overruled, and the only material difference in the counts was that, as amended, each claimed as for a different day. Only the rulings as to the first count as amended are insisted upon as error, and only such will be treated.

In order to determine the sufficiency of this count, or of any other in the complaint, or the correctness of the ruling upon the demurrer thereto, it becomes necessary to first determine the relation of the parties, and their respective rights and duties, one to the other. It has been generally, if not uniformily, held that the relation of carrier and passenger exists between railroads carrying United States mails, and the mail agents and postal clerks, and not that of master and servants. The same rule is declared as to express messengers. Elliott on Railroads (1897 Ed.) § 1578; Hutchinson on Carriers, § 1017 (563). These authorities hold that while postal clerks or mail agents cannot avail themselves of the contract between the railroad carrier and the government, and make it a foundation for recovery, they can, however, rest upon the breach of the duty which the law imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise the degree of care and skill in its performance which the nature of the undertaking requires; the obligation to carry, therefore, in such cases, may arise from duty as well as from contract.

It is indisputably the duty of railroads, as common carriers, to warm their cars for the comfort and safety of their passengers, and they are liable in damages for injuries suffered in consequence of failure to discharge such duty. The passenger, however, may, in such cases, be guilty of such contributory negligence as to cause the injury complained of, and if it is alleged and proven that such contributory negligence proximately caused the injury complained of, on account of failure to heat the car,

of course the passenger cannot recover. The failure of the passenger to protect himself from unnecessary cold, or to provide sufficient clothing, may or may not, be contributory negligence, depending upon the peculiar facts of each particular case. Taylor *v.* Wabash R. R. Co. (Mo.) 38 S. W. 304, 42 L. R. A. 110, and note. The true rule is, as stated by Chief Justice Smith, in the case of Turrentine *v.* R. & D. R. R. Co., 92 N. C. 641, in which he correctly quotes from an English case, " 'Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence and want of ordinary care and caution on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not; as but for his own fault the misfortune would not have happened.' And in explanation of the proposition he adds: 'Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care and caution, the misfortune would not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.' Wightman, J., in Tuft *v.* Warman, 94 Eng. Com. Law Rep. 573. The rule is thus so fully and definitely expressed as to require no further comments from us. The counterpart of this rule is declared in Gunter *v.* Wicker, 85 N. C. 310, Owens *v.* Railroad, 88 N. C. 502, Farmer *v.* Railroad, Ibid. 564, and in Aycock *v.* Railroad, 89 N. C. 321, that the defendant will be liable, notwithstanding previous negligence of the plaintiff, if, when the injury was done, it might have been averted by the exercise of reasonable care and prudence on the part of the defendant." This North Carolina case was a case on all fours with the one at bar, except that the acts of negligence, and contributory negligence, were somewhat different.

Postal clerks while on duty are not employees of the railroad carrier, and the railroad company may be liable to them for injuries caused by the negligence of its employees; they are entitled to the same degree of care as passengers, in the absence of an express agreement exempting the carrier from such liability; and the power to contract for carrying the mails, under the United States Revised Statutes, §§ 3997, 4007, has been held not to give the right to contract for such exemption. Seybolt's Case, 95 N. Y. 562, 47 Am. Rep. 75; Nolton's Case, 15 N. Y. 444, 69 Am. Dec. 623; Mellor's Case, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Ketcham's Case, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550, and note.

The relation of carrier and passenger being shown to have existed between the parties, we hold that count 1 of the complaint

as amended, was, under our liberal rules of pleading, sufficient, and certainly not subject to the infirmities insisted upon by the appellant; that is, that the count did not show the duty to carry plaintiff and did not sufficiently show negligence to support the action.

As to the sufficiency of the pleas of contributory negligence and assumption of risk, to which demurrers were sustained, we find no reversible error.

It is true, as claimed by appellant, that it is common knowledge that postal clerks, with United States mail, are carried in separate cars and coaches and not with other passengers; that these cars are specially equipped for the mail clerks and their particular work, and that passengers, as a rule, are not carried therein; but this does not, without a special contract, relieve the railroad company of the duty to properly heat these cars, for the comfort and health of the clerks and agents of the United States, who, by contract and by law, are required to remain at their posts while on duty. They cannot like ordinary passengers, go to another car if theirs is uncomfortable, but must remain in it while on duty, under a penalty imposed by statute of Congress. Fed. St. Ann. § 5474. In the absence of a special contract it is the duty of the railroad company to provide and maintain these cars, and to maintain and keep them safe and comfortable for these agents of the government. It is certainly not primarily the duty of the agents to heat, or to care for their cars otherwise than to protect the mails. Consequently, a postal clerk is not *prima facie* guilty of contributory negligence, nor does he assume the risk, by remaining in the car, and at his post of duty, after he knows of the uncomfortable condition of the car. He may, under certain conditions, be chargeable with the duty of notifying the proper agents or servants of the railroad company of the improper condition of the car, and of thus attempting to have it remedied, so as to alleviate the pain, suffering, or discomfort arising therefrom; but he is not guilty of contributory negligence or of assumption of risk by remaining in the car with knowledge of its condition, or by failing to warm or heat it himself. In the absence of contract, it is not his duty to heat it, but that of the railroad company; and it is also its duty to know, or at least to use due diligence to know, its condition, and to keep it reasonably safe and comfortable for the postal clerks and agents. None of these special pleas were sufficient as pleas of contributory negligence or assumption of risk, and the demurrers were properly sustained thereto. The pleas are treated by appellant, in bulk or in sections, and we will so treat them; but all were clearly insufficient.

There is nothing in appellee's contention that the bill of exceptions should be stricken. There is no motion to strike it; but, even if there were, the bill appears to have been signed within the time and in the manner required by law.

It was clearly competent for plaintiff to prove that the car was wet and damp; this certainly tended to show that the car would be thereby rendered cold and uncomfortable.

It was also competent and proper for plaintiff to testify as to his duties as postal clerk, when he had to enter the car, and how long he had to remain therein.

It was also proper to allow plaintiff to show that he made complaint, to defendant's agents, of the condition of the car to show that they had actual notice of its condition, and that it was the duty of such agents to heat the car.

The court properly limited the cross-examination as to the kind of bed plaintiff slept on in the car; there was no claim or contention that the car was cold, or that plaintiff suffered at that particular time. The court also properly declined to allow defendant to prove that plaintiff was a "chronic kicker." Any one might "kick" rather than have his "kickers" frostbitten.

We cannot say that there was reversible error in declining to allow the questions propounded to the express messenger, as to the temperature of the express car; it was sufficiently shown that such evidence would be relevant. It was not shown that the two cars were heated in all respects alike, but, on the contrary, it was shown that they were in some respects heated differently and constructed differently. So far as the evidence did appear, one was warm and one was cold; and one might very easily be comfortable and the other not. While it was shown that each had heating pipes supplied with steam from the engine, they also had other means of heating, which were different. It was indisputably shown that these pipes in the mail car were not heating the car—that it was in fact very cold—and that they had been cold for a long time. The evidence could probably have been made relevant, but it was not.

The court properly declined to allow defendant to prove that plaintiff had brought another suit against the defendant, to recover damages for sickness which occurred after the date of the injuries complained of in this case, to wit, on the 24th of February. The dates of the injuries here sued for, being January 16th, 18th, and 20th, that issue could not and should not be litigated on this trial. It could neither prove nor disprove any material issue on this trial.

Charge 1 was properly refused. There was no issue of contributory negligence in that the injuries of plaintiff were proximately caused by his wearing insufficient clothing; nor do we think there was any proof tending to show that all his damages were the result of inadequate clothing. If defendant relied upon this as contributory negligence it should have set it up. The evidence having indisputably shown negligence of defendant, as alleged, this could not be a bar to the entire right of recovery unless specially pleaded. The question of adequate clothing was

not litigated, and there was no evidence whatever to show that his clothing was not ample and sufficient, if the car had been properly heated.

Charges 9 and 10 were properly refused. There was no evidence to show that the action was barred by the statute of limitations; the amendments clearly related back to the beginning of the suit, which was within a year from the date of the wrong complained of.

Charge 11 was improper, as has been heretofore stated as to the sufficiency of the pleas. There was no contributory negligence or assumption of risk on the part of the plaintiff in not quitting the car and his post of duty because the car was not heated.

Charge 12 was properly refused because it does not assert a correct proposition of law. There was shown no duty on the part of the plaintiff to heat the car; that was defendant's duty.

There being no error, the judgment of the trial court must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MCCLELLAN, JJ., concur.

BROYLES *v.* CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Alabama, Dec. 16, 1909. Rehearing Denied Feb. 26, 1910.)

[52 So. Rep. 81.]

Carriers—Injuries to Passenger—Pleading—Relation of Parties.*—A count, in a complaint against a carrier for injuries, which charges simple negligence and fails to show that plaintiff was rightfully in the car, is insufficient, since, if plaintiff were a trespasser, defendant owed only the duty not to wantonly injure.

Carriers—Injuries to Passenger—Construction of Pleading—Negligence Charged.—A count, in a complaint against a carrier for injuries, alleging that the wreck was caused by the gross or reckless negligence of defendant, and that said gross and reckless negligence consisted in allowing rotten, unsound, and insecure cross-ties to remain under the rails of said road, etc., charges only simple negligence, and hence a failure to aver that plaintiff was rightfully on the train makes the count demurrable.

*For the authorities in this series on the subject of the degree of care due trespassers on trains or cars, see first foot-note of Johnson v. Great Northern Ry. Co. (Wash.), 29 R. R. R. 211, 52 Am. & Eng. R. Cas., N. S., 211; last foot-note of Southern Ry. Co. *v.* Clark (Ky.), 27 R. R. R. 246, 50 Am. & Eng. R. Cas., N. S., 246.

Broyles *v.* Central of Georgia Ry. Co

Carriers—Riding on Pass—Fraud on Carrier—Recovery for Injuries.†—Where plaintiff, with her mother, enters a train, and on demand for fare the mother gives a pass, issued for others, which the conductor takes, a fraud is practiced on the carrier, and the plaintiff is a trespasser on the train, even though she did not know about the pass, and hence she could not recover for injuries resulting from simple negligence.

Appeal and Error—Harmless Error—Pleading.—Error in sustaining a demurrer to a replication to a plea is harmless, where the replication contained the same averments as were contained in a count in the complaint, and a general issue was filed to that count.

Pleading—Pleading in a Circle—Replication.—It is not proper pleading to reply to a plea, where a defect is sought to be reached which could have been reached by a dmurrer to the plea.

Evidence—Uncommunicated Intention.—A witness may not testify, on the issue whether she knew that she was riding on a pass furnished by her mother, that she would have gone if her mother had not said anything about the pass, since a witness cannot testify as to uncommunicated motives or intentions, and for the same reason such witness could not testify that she would have paid her fare if demanded, and that she had money to pay her fare if demanded.

Carriers—Injuries to Passenger—Admissibility of Evidence.—Where a carrier claimed that plaintiff, suing for injuries, was not a passenger because she was riding on a pass issued to another, a question to plaintiff as a witness, whether it was customary for her to ride on a pass, is properly excluded, since it did not cover the issue.

Evidence—Suppositions.—On an issue of the right to ride on a pass, a witness may not testify whether she thought she had a right to ride on the pass, as uncommunicated thoughts or suppositions cannot be testified to.

Carriers—Injuries to Passenger—Admissibility of Evidence.—Where a carrier claimed that an injured passenger was a trespasser because riding on a pass issued to another given to the conductor by plaintiff's mother, who was sitting beside her, it is proper to ask the conductor whether he knew that the plaintiff and her mother were known by him to be the persons to whom the pass was issued, since, if they were not, they would be trespassers, and not passengers.

Carriers—Relation of Parties—Evidence.—Where the issue was whether persons riding on a train were trespassers because riding on a pass which was issued to others, the conductor of the train may properly testify as to what a passenger must have to entitle him to ride.

Evidence—Res Gestæ—Passenger Riding on Pass.—Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her or her mother, who was

†See note, 20 Am. & Eng. R. Cas., N. S., 128; Fitzmaurice *v.* New York, etc., R. R. (Mass.), 20 R. R. R. 635, 43 Am. & Eng. R. Cas., N. S., 635.

traveling with her, the conductor may testify as to whether the mother in handing the pass to the conductor indicated for whom she was tendering the pass, as it was part of the res gestæ.

Carriers—Injuries to Passenger—Riding on Pass—Competency of Evidence.—Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her, the conductor may be properly questioned as to whether he agreed to let plaintiff ride without paying her fare or showing some other right to ride in the train, and whether he had any right to permit plaintiff to ride without paying her fare or being provided with a pass, since it was competent to show that the conductor did not knowingly permit plaintiff to ride on a pass not issued to her.

Carriers—Injuries to Passenger—Right to Ride on Pass—Evidence.—Where a carrier claims that one injured while riding on a train was a trespasser, because riding on a pass not issued to her, which pass was given to the conductor by her mother, who was traveling with her, testimony of the conductor that the mother stated that she was giving the pass for her daughter as well as herself, in tones loud enough for her daughter to hear, is not subject to a general objection that it was incompetent, immaterial, and irrelevant.

Carriers—Injuries to Passenger—Riding on Pass.—Where the issue was whether one injured while riding on a train was trespasser, because riding on a pass issued to another, the conductor may testify whether he was under duty to compel passengers to identify themselves as the persons named in the passes.

Carriers—Relation of Parties—Presumptions.—Ordinarily, where a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded, unless his conduct should be such as to show that he was trying to evade a demand being made on him, by secreting himself, or otherwise; but, if he fails to pay after demand and opportunity to pay, the presumption ceases.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Mrs. Mamie Broyles against the Central of Georgia Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The complaint was as follows: Count 2: "Plaintiff claims of the defendant the like sum of $20,000 as damages, for that heretofore, to wit, on or about the 14th day of November, 1906, the defendant was engaged in carrying passengers for hire between Birmingham, Ala., and Montezuma, Ga.; that on or about said date the plaintiff entered a car on one of defendant's trains, in the city of Birmingham, Ala., and while riding therein, and while the said car was at or about Kellyton, Ala., the said car became wrecked or derailed, and as a result thereof the plaintiff was thrown against a portion of said car in which she was riding, and

was bruised, maimed, wounded, and injured internally and externally, and as a result thereof she has been caused to suffer," etc., a catalogue of which is given. The averments in counts A and B as to negligence are sufficiently set out in the opinion.

The following pleas were filed: (1, 2, and 3) The general issue. (4) "For further answer to each of the counts, separately and severally, defendant says that when plaintiff presented herself as a passenger, and got upon defendant's train at Birmingham, she had in her possession, or her mother, with whom she was at the time, and who undertook to arrange for the transportation of plaintiff, had in her possession, a pass issued by defendant to one Mrs. J. F. Slover and daughter; and the plaintiff, or her mother, Mrs. Little, presented said pass to the defendant's conductor without disclosing that the plaintiff and Mrs. Little were not the parties mentioned, described, and referred to in said pass, but as if they were the parties entitled to ride thereon; and defendant says that plaintiff was not Mrs. J. F. Slover, or Mrs. Slover's daughter, and was not entitled to ride on said pass, and had no other right to be on said train, and was accepted as a passenger and carried upon said train upon the said conduct or act of the plaintiff or her mother in presenting said pass to the defendant's conductor, and the belief of defendant's servant in charge of said train that plaintiff was one of the persons entitled to ride on the pass issued to Mrs. J. F. Slover and daughter; and defendant avers that its servants or agents did not know that plaintiff was not one of the persons entitled to ride on said pass; and defendant says that the plaintiff neither paid nor offered to pay anything for her transportation of said train from Birmingham to Kellyton." Plea 5 sets up the same state of facts, and alleges that the pass entitled Mrs. Slover and daughter, and no one else, to ride thereon, and was not intended for the use of the plaintiff, and did not entile her to ride thereon, and avers that the plaintiff was neither Mrs. Slover nor her daughter. Plea 7 is in all respects similar to the other two.

The following replications were filed to the pleas: (1) "That if any pass or authority for being upon said train was presented to or accepted by the conductor or agent of defendant, and was a pass or authority for another to ride upon the said train other than plaintiff's mother or herself, it was without the knowledge of plaintiff." (2) "Plaintiff says that she entered upon plaintiff's train at Birmingham, intending to be a passenger thereon from Birmingham to Montezuma, Ga.; that she was in company with her mother, who had the said pass or token; that she, the plaintiff did not have possession of said pass or token, and did not deliver the same to the conductor or agent of defendant; but that her mother had the said pass or token, and delivered the same to the said conductor or agent of the defendant, and that the said conductor or agent received the same. Plaintiff avers that

she went upon said train or car in good faith, believing that she had a right to be there as a passenger, and not knowing that she had no right to be received as a passenger upon said train or car under said token or pass, and that said conductor or agent of the defendant received from plaintiff the sum of $1 for the right to ride on said car or train."

Arthur L. Brown, for appellant.
London & Fitts, for appellee.

EVANS, J. This action was brought by the appellant, Mrs. Mamie Broyles, against appellee, the Central of Georgia Railway Company, seeking damages for personal injuries sustained by her while on one of the regular passenger trains of defendant en route from Birmingham, Ala., to Montezuma, Ga. The train was derailed near Kellyton, Ala., and plaintiff sustained injuries by reason thereof. There are 22 assignments of error by appellant to the rulings of the court below upon the pleadings and the evidence.

The demurrer to second count of complaint was properly sustained. Said count charges only simple negligence and does not show that plaintiff was rightfully in the car of defendant. Construing said count most strongly against the pleader, as the law requires, we must conclude therefrom that plaintiff was a trespasser, and, therefore, that defendant owed her no duty except not to willfully, wantonly, or intentionally injure her. Beyer *v.* Louisville & Nashville Railroad Co., 114 Ala. 429, 21 South. 952; James M. Brown & Co. *et. al. v.* Scarboro, 97 Ala. 316, 12 South. 289.

The demurrer to counts A and B were properly sustained for the same reasons above given for sustaining demurrer to count 2. The allegations of count A as to negligence are as follows: "Plaintiff avers that said wreck or derailment was caused or brought about by the gross or reckless negligence of defendant, its agents, servants, or employees, whilst engaged in or about the duties of their employment. And plaintiff avers that said gross and reckless negligence consisted in this, to wit, that rotten, unsound, and insecure cross-ties were allowed to remain under the rails of said road at the place where said wreck or derailment occurred, and that said track was in an unsafe condition, thereby causing said wreck or derailment of said train when passing over said defective track. Plaintiff avers that the injuries so received by her were proximately caused by said gross and reckless negligence." We are of opinion that the facts as set out in said count, when construed most strongly against the pleader, do not constitute anything amounting to willfulness or wantonness. This court could not say that an occasional rotten, unsound, and insecure cross-tie amounted to willfulness or wantonness even if known to defendant. We would

not be understood as saying that cross-ties might not be rotten, unsound, and insecure to sufficient extent in number and degree to constitute wantonness and willfulness to run a passenger train over them at sufficient rate of speed. But what we say is that the averments in said count A construed as the law construes them, do not make a case of wantonness or willfulness. We therefore construe said count to allege that plaintiff was a trespasser on said car and was injured by the simple negligence of defendant.

We think that count B is subject to the same criticism as count A. The averments in both counts A and B constitute simple negligence. Stringer's Case, 99 Ala. 410, 13 South. 75; K. C., M. & B. R. R. Co. *v.* Crocker, 95 Ala. 412, 11 South. 262; L. & N. R. R. Co. *v.* Barker, 96 Ala. 435, 11 South. 453.

Demurrers to pleas 4, 5, and 7 were properly overruled. The pleas clearly allege facts showing that the plaintiff practiced a fraud upon defendant; or her mother, acting for her, practiced a fraud upon defendant; and plaintiff was enjoying the benefits of such fraud, at the time she received the injuries complained of, and after the conductor in charge of the train had demanded her fare. Such being the case, defendant was under no duty to carry plaintiff as a passenger, and the relation of passenger and carrier did not exist, and plaintiff was a trespasser. If there are any defects in said pleas, they are not pointed out by the demurrer.

The demurrer to replication 1 was well taken and properly sustained. If the other matters set up in the pleas were true, it is manifestly immaterial whether she knew or did not know the matters set up in said replication. If plaintiff's mother was acting as her agent in tendering said pass for plaintiff, she cannot be heard to say that she did not know the contents thereof and thereby escape the consequences of such fraud.

If there was error in sustaining demurrer to replication 2, it was error without injury, in so much as said replication is a substantial reproduction of the allegations of count E of the complaint, so far as said replication undertakes to show the right of plaintiff to be upon defendant's train. The plaintiff had the full benefit of the matter there pleaded in the issue raised by the general issue filed to said count E. Pleas 4, 5, and 7 were pleas in confession and avoidance, confessing all of said count except that part which is reproduced in replication No. 2. If said pleas were not a sufficient answer to count E, the defect should have been pointed out by proper demurrer to said pleas as an answer to that count. To allow that kind of pleading would be pleading in a circle, and there would be no end to it. The court, of its own motion, would have a right to eliminate it as a waste of time.

The plaintiff, testifying for herself, stated: "I did not request

Mrs. Little to get or furnish me with a pass or transportation, because I would have gone if she had not said anything about a pass." On motion of defendant the words, "because I would have gone if she had not said anything about a pass," were stricken. It has been so often decided by this court that a witness cannot testify to his uncommunicated motive or intention that we deem it unnecessary to cite authorities. Uncommunicated intention or purpose is an inferential fact not capable of direct proof, but must be inferred from facts proven.

Plaintiff, testifying for herself, was asked by her attorney, "I will ask you if you had money to pay your fare if it had been demanded." Witness had been allowed to testify that she had with her a certain amount of money, and she could not testify to her secret intentions or purposes. The court properly sustained the objection to the question. So, also, to the following question asked plaintiff by her attorney: "I will ask you whether or not you would have been willing to have paid your fare if it had been demanded?"

The court also properly ruled in sustaining objection to the following question propounded to plaintiff by her counsel: "I will ask you if it was not customary for you all to ride on passes." The question did not go far enough to state a custom which would include the present case; that is, to ride upon passes issued for other people and upon which plaintiff and her mother had no right to ride, and that it was done with the knowledge and consent of the proper authorities of the defendant corporation. So, also, were objections properly sustained to the following questions asked the same witness by her counsel: "Did you know of your mother having a pass before this time over this road?" Whether she did or not was clearly immaterial. So, also, the following question asked the same witness by her counsel: "I will ask you whether you supposed or thought when you boarded the car that you had a right to ride on the pass which was held by your mother." Uncommunicated thoughts and suppositions cannot be testified to.

The defendant asked his witness T. L. Gordy, the conductor who took up the fares upon this occasion, "At the time the pass was handed to you, was any information given you that the plaintiff was not the person named in the pass?" The plaintiff objected to this question, and the court overruled the objection, and plaintiff excepted to the ruling of the court. We think the court properly overruled the objection. If the mother of plaintiff and the plaintiff were not known to witness, and the mother handed to witness a pass in due and proper form, properly signed, and pointed out plaintiff, who was sitting on the same seat with her as one of the persons to ride upon said pass, the conductor had the right to presume that the mother and plaintiff were the persons named in said pass; and to hand in

such a pass and conceal their identity by their silence was a fraud and was entirely relevant to issues raised by the fourth, fifth, and seventh pleas. The plaintiff moved to exclude the following testimony of the witness Gordy: "You have to have a ticket, cash fare, or pass, or something the conductor can turn into headquarters, showing that that passenger was entitled on that train." The above was in answer to the following question: "What must a passenger have to entitle him to ride on the train?" The question was also objected to, but the overruling of the objection is not assigned as error. There was no error in refusing to exclude said testimony. The conductor of a train, whose duty it is to determine who are passengers and who are not, is presumed to know what a passenger must have in order to entitle him to ride on the train and thereby become a passenger, and that is one of the material inquires in this case. Defendant asked the witness Gordy the following questions: "At the time the elderly lady handed you the pass, how, if in any way, did she indicate for whom she was tendering the pass?" The objection to this question was properly overruled, as it would naturally call for evidence entirely legal and proper. It called for evidence as to a part of the actual transaction whereby defendant was allowed to ride upon said train. It was a part of the res gestæ.

Defendant asked the witness Gordy, "Did you agree for her to ride without paying her fare?" The objection to this question was properly overruled because it was inquiring as to right of plaintiff to be upon the car, as was also objection to the following question and for the same reason: "I will ask you if you agreed for the plaintiff to ride without paying her fare, or showing some other right to ride on the train." Also, the objection to the following question: "I will ask you under the rules of the company if you had any right to permit plaintiff to ride without she was paying her fare or being provided with a pass." If any inference could arise from the evidence that he was knowingly permitting her to ride without paying fare or having a pass, then it was proper to show that he, as agent of defendant, had no such authority whereby he could establish the relation of carrier and passenger between defendant and plaintiff. It was evidently competent under the issues of this case that its agent did not knowingly consent for plaintiff to ride as a passenger without paying her fare or to ride upon a pass issued to another and that he had no authority to do so.

Plaintiff assigns as error the overruling of her objetcion to the following question asked by defendant of the witness Gordy: "Did the lady make the statement for herself and daughter?" The witness had just stated that "the lady handed me the pass and said it was for herself and daughter" in a tone loud enough for plaintiff to hear. The answer of the witness to the said

question objected to was: "O, just an ordinary tone. It was loud enough for plaintiff to have heard what was said." It is evident from this answer that the witness did not understand, and did not answer, the question; but, if it is an answer to the question, then the question was properly allowed. In either event there was no reversible error. The grounds of objection were that it was incompetent, immaterial, and irrelevant. It was not subject to objection on these general grounds.

The following question propounded to the witness Gordy by defendant was objected to by plaintiff: "Are you by the rules required to compel persons who tender passes on your train to identify themselves as the persons named in the passes?" The objection was properly overruled, as it called for evidence pertinent to the inquiry as to whether she was or could have been, under any inference to be drawn from the evidence, a legal passenger on said train.

The twentieth assignment of error is the same as the third, fourth, and fifth assignments, which have already been considered.

The court, upon request of defendant, gave the general affirmative charge for defendant in writing, viz.: "If the jury believe the evidence, you will find for the defendant." The plaintiff now assigns the giving of said charge as error. As stated in the briefs of both sides to this suit, "The whole question in the case is whether or not appellant was rightfully on defendant's train." It is proper to add, "at the time the injury to plaintiff was inflicted." The decision of this question in this case depends upon whether or not, at the time of the wreck, the relation of carrier and passenger existed between appellee and appellant. There can be no dispute, and it has been universally so held, that to create this relation there must be a contract to that effect either express or implied. There can be no doubt but that the relation exists by implied contract from the moment a person enters the passenger coach of a regular passenger train with the *bona fide* intention of becoming a passenger and of paying fare according to the rules and regulations of such carrier, when the same is demanded by the proper person, and has with him the means of doing so. In this case we are not concerned with the question of good or bad intent. Under the facts of this case, did the relation of carrier and passenger exist at the time of the accident or injury? Plaintiff's fare had already been demanded by the conductor, and her mother, in her presence, had given the conductor a pass, which was issued for the benefit of other parties than plaintiff and her mother, and which gave plaintiff and her mother no right to ride thereon. The fact that plaintiff's mother and plaintiff were not the persons named in said pass was not known to the conductor, nor was it disclosed by either the mother or plaintiff; and the mother pointed out plaintiff as the other

person entitled to ride on said pass besides herself. The conductor took the pass as authority for them to ride on said train, and plaintiff continued to ride thereon. Some time after this transaction the accident occurred from which the injury resulted. Can the plaintiff claim that the facts of this transaction made a contract whereby the relation of passenger and carrier was created between the plaintiff and defendant, of which she can take advantage in this suit? We think that the facts show a fraud from which the plaintiff can derive no benefit in this suit. Even if the conductor had known the parties and connived with them to beat the defendant out of the fare due for the transportation, the rule would be the same. As stated in the case of Condran, Admix, etc., *v.* Chicago, Milwaukee & St. Paul R. Co., 67 Fed. 523, 14 C. C. A. 508, 28 L. R. A. 752: "The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its trains, under the conditions named, the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. * * * It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare. * * * One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured, by an accident happening to the train, not due to recklessness or willfulness on the part of the company, he cannot recover." Ordinarily, when a person boards a train with money sufficient to pay his fare, it will be presumed that he intends to pay his fare until his fare is demanded, unless his conduct should be such as to show that he was trying to evade demand being made on him by secreting himself or otherwise; but after demand is made, and he has the opportunity of paying, and he fails to do so, the presumption ceases unless some good excuse is shown for not then paying.

The affirmative charge was properly given for defendant.

Affirmed.

DOWDELL, C. J., and ANDERSON and SAYRE, JJ., concur.

ST. LOUIS & S. F. R. CO. *v.* JOHNSON.

(Supreme Court of Oklahoma, March 8, 1910.)

[108 Pac. Rep. 378.]

Territories—Legislative Power—Ratification of Act by Congress—Subsequent Repeal or Amendment.—An act of the territorial Legislature which requires the ratification of Congress in order to make it valid as law, after such ratification cannot be modified, repealed, or amended by the Legislature without the assent of Congress.

Carriers—Rules—Ejection of Passengers.*—Under section 504 of the Compiled Laws of Oklahoma of 1909, common carriers of persons may make reasonable rules for the conduct of their business, and may require passengers to conform thereto and under the provisions of section 506 may eject any passenger who refuses to conform thereto, provided the same is done with as little violence as possible at any usual stopping place or near some dwelling house.

Carriers—Rules—Limit of Ticket.†—Common carriers of passengers may limit the time within which tickets for passage will be valid subject only to the qualification that the limitation made is reasonable.

Carriers—Carriage of Passengers—Ejection—Right of Recovery.*—January 24, 1905, plaintiff purchased an ordinary local ticket over the line of the St. Louis & San Francisco Railway, at Chandler, Okl. T., for passage to Oklahoma City. The same was stamped as of the date of purchase, and on its face bore the condition, "good only one day from date of sale as stamped on back." Not having used the same plaintiff tendered it for passage on April 8, 1905, and the same was refused by the conductor, and on plaintiff's refusal to pay his fare was, in the daytime near a residence and without violence, required to leave the train, whereupon he brought suit for damages, and on a showing of these facts the court denied a request for an instructed verdict for the defendant. Held error.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by R. L. Johnson against the St. Louis & San Francisco

*For the authorities in this series on the subject of the validity of a carrier of passenger's rules and regulations, see third foot-note of Black *v.* Atlantic Coast Line R. Co. (S. Car.), 32 R. R. R. 603, 55 Am. & Eng. R. Cas., N. S., 603; first head-note of Tompkins *v.* Boston Elev. Ry. Co. (Mass.), 32 R. R. R. 487, 55 Am. & Eng. R. Cas., N. S., 487.

For the authorities in this series on the right to eject passengers on account of failure to tender valid ticket and refusal or failure to pay fare, see second foot-note of Mace *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 15, 57 Am. & Eng. R. Cas., N. S., 15.

†See first foot-note of Brian *v.* Oregon Short Line R. Co. (Mont.), 34 R. R. R. 18, 57 Am. & Eng. R. Cas., N. S., 18.

Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions to dismiss.

Flynn & Ames and *R. A. Kleinschmidt,* for plaintiff in error.
J. H. Grant and *E. G. McAdams,* for defendant in error.

DUNN, C. J. This action presents error from this district court of Oklahoma county. R. L. Johnson, as plaintiff, sued plaintiff in error, as defendant, in the probate court of Oklahoma county, filing his petition therein prior to statehood. After trial in that court the case was appealed by the defendant, against whom judgment was rendered to the district court of Oklahoma county, and a trial de novo had therein. Plaintiff was again successful and recovered a judgment, to reverse which defendant has brought the case to this court. The action is one for damages on account of an alleged wrongful expulsion of plaintiff from a train on defendant's road. We are met at the outset of our consideration of this case by an objection to our jurisdiction, counsel for defendant in error insisting that under section 4, art. 3, c. 12, of the Session Laws of Oklahoma of 1905, all appeals from final judgments of the probate court, except certain ones not necessary to here notice, should be taken direct to the Supreme Court of the territory, and it is contended that jurisdiction was not vested in the district court to entertain a trial of this case de novo. Counsel for plaintiff in error contend that the statute referred to was ineffective to divest the district court of jurisdiction upon the probate courts, and allowing an appeal in cases such as this to district courts, for trial de novo was an act which became effective by and through congressional sanction, and the territorial Legislature did not have authority to amend it as was attempted in the section above noted. On this proposition we cannot agree with counsel for defendant in error. The Supreme Court of the territory of Oklahoma in the case of Martin *v.* Territory, 8 Okl. 41, 56 Pac. 712, held: "An act of the territorial Legislature, which requires the ratification of Congress in order to make it valid as law, after such ratification cannot be modified, repealed, or amended by the Legislature without the assent of Congress." The section of the Session Laws of 1905 never having received the assent of Congress was not effectual to amend the act referred to, and the district court had jurisdiction to entertain this cause. This brings us to the consideration of the case on its merits.

A statement of the facts involved, sufficient upon which to predicate the conclusion to which we have come, is embodied in the following: Plaintiff testified that on the 8th day of April, 1905, he resided at Oklahoma City, and was coming home from Tulsa on the Frisco. He bought a ticket from Tulsa to Sapulpa, and during the journey tendered to the conductor a ticket from Chandler to Oklahoma City, which he had purchased at Chandler

on the 24th day of January, 1905, at a cost of $1.46. The conductor said the ticket was out of date and that Johnson would have to pay cash fare; refusing to do this, he was put off the train about 1½ miles west of Chandler. He identified the ticket which is as follows: "St. Louis & San Francisco Railroad Company. Frisco System. Chandler, O. T.—C 47. Oklahoma City, O. T.—O 12. Good only one day from date of sale as stamped on back and on such trains as stop at destination of ticket, as per official time table. A. Hilton, G. P. A. A5185." On the back of said ticket is stamped: "St. Louis & San Francisco Railroad Company. Chandler, O. T., Jan. 24, 1905." He further testified that he had been a traveling salesman for 15 years, and had bought a great many tickets in that time; that he could read and write; that he had the ticket in question in his pocket all the time between the 24th day of January, when it was bought, and the 8th day of April, when it was tendered for passage; that on the day in question he bought a ticket from Tulsa Sapulpa, also a ticket from Sapulpa to Bristow, and, when he gave the conductor that ticket, paid cash fare from Bristow to Chandler; that he presented the ticket in question at the time he paid the cash fare from Bristow to Chandler and before reaching Chandler, and at that time the conductor told him that it was no good; that when the train stopped at Chandler he made no attempt to buy another ticket. When the conductor came through after leaving Chandler, he again tendered him the ticket in question, and the conductor again told him the ticket was not good, as it had expired. The conductor demanded fare, and plaintiff told him that was his ticket. The conductor said he would have to put him off the train if he did not produce another ticket or pay cash fare. "Q. He told you he would put you off the train if you didn't produce another ticket, or pay the cash fare, and then what did you say to that? A. I said: 'It is up to you.' Q. He stopped the train? A. Yes, sir. Q. At once? A. Yes, sir. Q. And you went out on the platform with him? A. Of course; but I didn't go of my own accord. Q. He had to put you off? A. Yes, sir. Q. You would not have gone out if he had not taken you by the arm, and put you out? A. I didn't want to get off. Q. You were not going to get off unless he made you get off? A. No, sir."

The uncontradicted testimony on the part of the railway company given by its conductor was that, prior to reaching Chandler, Johnson offered him the ticket in question, and he called his attention to the fact that the same had expired and was not valid; that Johnson said the ticket was all right until used, to which the conductor replied it was not and could not be accepted; that after the train left Chandler he again called on this passenger for his ticket and was tendered the one in question. He again informed him that it was no good and could not be accepted, and Johnson stated that was all he would get, and that he refused

his fare, whereupon he was asked if he wanted to get off, or if he would have to put him off, and he said he would have to be put off. The conductor then took hold of Johnson's sleeve, and led him out between the seats and Johnson stepped off on the ground. There was no disturbance or violence of any kind. It was a clear morning in April within sight of Chandler, and a dwelling house about 200 yards from the track. The station agent testified that the ticket was an ordinary local ticket of the defendant company.

The damages claimed are general, no special damages being averred or proven. At the conclusion of the evidence defendant asked the court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, which was refused. This ruling was excepted to, and is one of the errors urged in this court. It will thus be seen that the question presented is whether or not a railway company may limit a first-class local ticket purchased for passage by a provision making the same good only one day from the date of the sale as stamped on the back, and enforce such limitation by the eviction of a passenger who had purchased it at a time antedating the time fixed and who had not used it. It is the contention of counsel for defendant in error that the ticket constituted no contract between the parties; that the purchaser did not have his attention called to the printed condition thereon, and that he was not bound thereby.

Comp. Laws Okl. 1909, §§ 504, 505, and 506, dealing with the power of common carriers of persons to make rules for the conduct of their business and of their right to eject all who refuse to pay fares or conform to any lawful regulation, provide:

"504. A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them if they are lawful, public, uniform in the application, and reasonable.

"505. A common carrier may demand the fare of passengers either at starting or at any subsequent time.

"506. A passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping place, or near some dwelling house. After having ejected a passenger, a carrier has no right to require the payment of any part of his fare."

Was the regulation enforced in this case a reasonable one? It is a matter of common knowledge possessed by all who travel that local tickets generally if not uniformly contain the condition of the one in the case at bar limiting the time within which the same may be lawfully presented for passage. Every question presented in this case for our consideration was considered and passed on by the Supreme Court of the state of Kansas in the

recent case of Freeman *v.* A., T. & S. F. Ry. Co., 71 Kan. 327, 80 Pac. 592, in which case the court directed a judgment for the defendant company on facts almost identical with those in the case at bar, and, on an appeal being taken, the Supreme Court *sustained* that action. The court in the consideration of the case *said:* "There was no ambiguity in the condition expressed on the ticket. The date on the back was abbreviated, it is true, but it was in a form commonly used in business transactions, and one that a man of ordinary intelligence could not misunderstand. His signature was not attached to the contract, and he says that he did not notice the printed limitation in the ticket until it was refused; but the absence of his signature did not eliminate the condition, and he is bound by, and must take notice of, limitations plainly printed on the face of the ticket. No statement was made by the agent who sold the ticket with reference to the time when it might be used, nor was anything said as to the character of the ticket that would mislead the plaintiff. There was daily service on the railroad between Argonia and Wichita, and hence it cannot be said that the condition limiting the time of use to one day from the time of sale was unreasonable. That condition being plainly expressed on the ticket, it will be presumed to have been consented to be the purchaser in the acceptance and use of the ticket itself. Among the authorities sustaining these views are the following: Dangerfield *v.* Railway Co., 62 Kan. 85, 61 Pac. 405; Railroad Co. *v.* Price, 62 Kan. 327, 62 Pac. 1001; Rolfs *v.* Railway Co., 66 Kan. 272, 71 Pac. 526; Hanlon *v.* Illinois Central Railroad Co., 109 Iowa, 136, 80 N. W. 223; St. Clair *v.* Railroad, 77 Miss. 789, 28 South. 957; T. & N. O. Ry. Co. *v.* Powell, 13 Tex. Civ. App. 212, 35 S. W. 841; Callaway, Receiver, *v.* Mellett; 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238; Lillis *v.* St. Louis, Kansas City & Northern Ry. Co., 64 Mo. 464, 27 Am. Rep. 255; Boston & Lowell Railway Co. *v.* Proctor, 1 Allen [Mass.] 267, 79 Am. Dec. 729; State *v.* Campbell, 32 N. J. Law, 309; Elmore *v.* Sands, 34 N. Y. 512, 13 Am. Rep. 617; Boice *v.* Hudson River Railroad Co., 61 Barb. [N. Y.] 611; Rawkitzky *v.* Railway Co., 40 La. Ann. 47, 3 South. 387; Coburn *v.* Railway Co., 105 La. 398, 29 South. 882, 83 Am. St. Rep. 242; Pennsylvania Co. *v.* Hine, 41 Ohio St. 276; Hutch. Carr. pp. 576-581; 1 Pet. Carr. p. 285; 3 Thomp. Neg. p. 2599; 8 Ency. 575."

While it is true there are several authorities in conflict with the foregoing, yet the reasons for the rule are to our minds so manifestly just that we feel no hesitancy in following the almost universal consensus of judicial opinion on the same.

The judgment of the trial court is accordingly reversed, and the case is remanded, with instructions to dismiss the same.

TURNER, KANE, and HAYES, JJ., concur.
WILLIAMS, J., absent, and not participating.

LOUISVILLE & N. R. CO. *v.* FISH.

(Court of Appeals of Kentucky, April 27, 1910.)

[127 S. W. Rep. 519.]

Carriers—Passengers—Ejectment from Trains—Contributory Negligence.*—A passenger buying a round-trip ticket, who did not observe the mistake of the conductor, who retained the return part of the ticket, was not guilty of contributory negligence because of his failure to observe the mistake and could sue for being ejected from the train on the return trip on the refusal of the conductor to accept his ticket.

Carriers—Ejection of Passengers—Damages.—Where a passenger was ejected from a train because of the invalidity of his ticket, and the conductor was not abusive, but polite and kind to the passenger, who was forced to walk in the daytime 11 miles, and there was nothing to show that the weather or the roads were bad, a verdict for $500 was excessive.

Appeal from Circuit Court, Rockcastle County.

"Not to be officially reported."

Action by W. H. Fish against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Brown, John T. Shelby and *Benjamin D. Warfield,* for appellant.

C. C. Williams and *S. D. Lewis,* for appellee.

BARKER, C. J. The appellee, W. H. Fish (plaintiff below), purchased from appellant (defendant below) a railroad ticket from Wildie, Ky., to Richmond, Ky., and return. The two tickets as delivered to appellee were on one piece of pasteboard. After plaintiff boarded the train at Wildie, he handed the conductor the round-trip ticket. This officer tore the tickets apart and handed the appellee what he doubtless thought was that part which entitled him to return on board the train from Richmond to Wildie; but, in fact, by mistake the conductor kept that part of the ticket and returned to appellee the part which evidenced his right to ride from Wildie to Richmond. The appellee was transported from Wildie to Richmond, where he attended to the business for which he made the trip, and the next day undertook to return from Richmond to Wildie on one of appellant's passenger trains. While en route his ticket was demanded

*See second paragraph of first foot-note of preceding case; foot-notes of Mace *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 15, 57 Am. & Eng. R. Cas., N. S., 15; Arnold *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 217, 57 Am. & Eng. R. Cas., N. S., 217.

by the conductor, and appellee handed him that part of the ticket which had been returned to him by the conductor of the other train the day before. The second officer, observing that the ticket entitled the bearer to a ride from Wildie to Richmond and not from Richmond to Wildie, declined to accept it or to permit appellee to ride on the train to his destination, unless he paid his fare. Appellee was without money and had no acquaintances or friends upon the train from whom he could borrow, and, in pursuance of the demand of the conductor, got off the train before he arrived at his destination, and walked 11 miles to his destination. To recover damages for the wrong thus done him, he instituted this action and recovered damages in the sum of $500. Of the judgment based upon this verdict the appellant now complains.

The appellant was not entitled to a peremptory instruction at the conclusion of the evidence for plaintiff. The latter purchased a round-trip ticket and was entitled to ride thereon from Wildie to Richmond and from Richmond to Wildie. He handed the first conductor the whole ticket, as it was his duty to do, and that officer, instead of returning to appellee the correct part of the ticket, by mistake returned to him that part which he should have kept, and kept that part which he should have returned. This negligent act was the whole cause of the trouble and consequent injury to appellee. We do not think appellee was negligent in failing to observe the mistake of the officer in returning to him the wrong part of the ticket. He had a right to rely upon the accuracy and diligence of the officer and to assume that the right ticket had been returned to him. He did not observe the mistake, and was guilty of no contributory negligence by his failure to observe it. The very question we have was involved in the case of Southern Railway in Kentucky *v.* Hawkins, 121 Ky. 415, 89 S. W. 258, 28 Ky. Law Rep. 364, and it was there held that a passenger who was put off of a train by the conductor because he did not have a proper ticket could recover from the railroad, because his failure to have a proper ticket was the result of the negligence of the ticket agent, who by mistake had failed to stamp correctly the ticket he sold to the passenger. We do not feel it necessary to analyze the opinion delivered in that case any further. It is sufficient to say that it settles adversely to appellant every question involved on this appeal, except the amount of the damages awarded by the jury in their verdict.

The instructions of the court in the case at bar were approved in Lexington & Eastern R. R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209, 20 Ky. Law Rep. 516.

We think, however, the verdict awarding appellee $500 damages was excessive. It is not pretended that the conductor did any more than his duty in requiring the plaintiff to pay his fare

or leave the train. He was not abusive, but, on the contrary, was polite and kind to appellee.

It is true, appellee was forced to walk 11 miles, and that he was suffering with some stomach trouble, but it was in the daytime, and there was no intimation that either the weather or the roads were bad, and, while appellee says it made him tired, we cannot but feel that $500 was very much more than he was entitled to recover under the circumstances; and for this reason alone the judgment is reversed for further proceedings consistent with this opinion.

WICKERT *v.* WISCONSIN CENT. RY. CO.

(Supreme Court of Wisconsin, April 5, 1910.)

[125 N. W. Rep. 943.]

Negligence—Actionable Negligence—Elements.*—To make out actionable negligence, it must appear that the person sought to be charged therewith had knowledge, actual or imputed, that the act or omission complained of was likely to cause injury to some person or thing.

Negligence—Actionable Negligence—Elements.*—Knowledge of the dangerous quality of an act or omission complained of, as likely to cause injury to a person or thing, may be imputed to the person charged therewith, where there is a duty to know, and where a person of ordinary care under similar circumstances by ordinary care to have known of such likelihood.

Carriers—Injuries to Person on Train—Negligence.†—In the absence of evidence to the contrary, trainmen may presume that all persons boarding a train at a station for the reception of passengers are passengers.

Carriers—Injuries to Person on Train—Negligence.†—Where trainmen did not know and were not chargeable with knowing that a person who boarded a train at a station was not a passenger, but only boarded the train to accompany friends, who were passengers, and intended to alight, they were not negligent in starting the train before such person had alighted, though he was rightfully on the train

*See first foot-note of Langenfeld *v.* Union Pac. R. Co. (Neb.), 34 R. R. R. 727, 57 Am. & Eng. R. Cas., N. S., 727; first foot-note of Wilkinson *v.* Oregon S. L. R. Co. (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; second foot-note of Perryman *v.* Chicago City Ry. Co. (Ill.), 34 R. R. R. 93, 57 Am. & Eng. R. Cas., N. S., 93.

†For the authorities in this series on the subject of the duties and liabilities of the carrier with respect to persons assisting or accompanying passengers, see second paragraph of first foot-note of Yazoo & M. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54; Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237.

by customary invitation, and though the trainmen owed him the duty of ordinary care.

Appeal from Circuit Court, for Marquette County; A. H. Reid, Judge.

Action by Anna Wickert against the Wisconsin Central Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appeal from a judgment of the circuit court for Marquette county entered upon a verdict directed for defendant in an action to recover damages for personal injury caused by defendant's negligence.

Among other references cited upon the part of the appellant were the following: Townley, etc. *v.* C., M. & St. Paul Ry. Co., 53 Wis. 626, 11 N. W. 55; Davis *v.* C. & N. W. Ry. Co., 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Cahill *v.* Layton, 57 Wis. 600, 16 N. W. 1, 46 Am. Rep. 46; Dowd *v.* C., M. & St. Paul Ry. Co., 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917; Langhoff *v.* M. & P. du Chien Ry. Co., 19 Wis. 489; Powell *v.* Ashland I. & S. Co., 98 Wis. 35, 73 N. W. 573.

Among those cited upon the part of the respondent were the following: Griswold *v.* C. & N. W. Ry. Co., 64 Wis. 652, 26 N. W. 101; Ives *v.* Wis. Cent. Ry. Co., 128 Wis. 357, 107 N. W. 452; Morey *v.* Lake Superior, etc., 125 Wis. 148, 103 N. W. 271, 12 L. R. A. (N. S.) 221.

D. W. McNamara, for appellant.
Walter D. Corrigan and *Clifton Williams,* for respondent.

TIMLIN, J. The question presented by this appeal is whether the circuit court properly directed a verdict for defendant. In order to make out a case of actionable negligence, it must appear that the person sought to be charged therewith had knowledge that his act or omission complained of was likely to cause injury to some person or thing. This knowledge may be either actual or imputed. Knowledge of this dangerous quality of the act or omission in question is or may be imputed in a great number of instances, among them when there is a duty to know, and also when a person of ordinary care and prudence under the same or similar circumstances in the exercise of ordinary care ought to have known of the likelihood. Hasbrouck *v.* Armour, 139 Wis. 357, 121 N. W. 157. Like other subjects of legal investigation, these may be questions of fact, questions of law, or mixed questions of fact and law in a given case. The uncontradicted evidence in the instant case establishes the following: The sister and the niece of plaintiff, with the three children of this niece, were passengers, waiting on the depot platform for the arrival of the train which they were about to board. The

plaintiff and her grown-up daughter accompanied these passengers for the purpose of seeing them off. The passenger train in question, having one passenger coach next behind the smoking car, stopped at the station, the passengers, of whom there were quite a large number alighting at this station, were descending the steps at the front end of this passenger coach, and the conductor was assisting these passengers to descend, standing with his face toward the descending passengers and toward the passenger coach. The group of seven, including the said passengers about to embark and the plaintiff and her daughter, while the conductor was so engaged stood behind him, said their farewells and exchanged parting kisses. The plaintiff's niece first, and then plaintiff's sister, ascended the steps of the smoking car to the platform of that car, from which point the niece called out to plaintiff, "Aunt, bring up the baby and the satchel." The niece then went into the passenger car and took a seat. Plaintiff's sister remained near the door of the passenger car. Plaintiff ascended the steps of the smoking car, crossed the platform of this car and the platform of the passenger car to where her sister was standing, gave the satchel to the latter, turned and began to descend the steps of the passenger car, and had reached the second step in her descent, when the train began to move out moderately, whereupon she became dizzy, and soon fell from the steps sustaining injuries. When the plaintiff was ascending the steps leading to the platform of the smoking car, and after she had reached that platform, the passengers from the other car were still descending the steps of that car, but after she delivered the satchel to her sister and started to descend there was no other person descending the steps and no conductor in sight. The conductor, after looking along his train and seeing no one attempting to board the train or to descend from either car, called out, "All aboard," and gave the signal to the engineer to pull out. The engineer rang his bell and started his engine and moved out. The conductor from the place at which he stood when he gave the signal to start as fixed by his uncontroverted testimony could not see the plaintiff because she had not at that time reached the second step in her descent. The signal must have preceded the starting of the train, and the signal and the starting could not have been simultaneous. The plaintiff tarried somewhere on either car platform before attempting to descend. Neither the conductor nor the brakeman had any actual knowledge that the plaintiff was upon the car platform with the intention of alighting therefrom before the train started or that she was not a passenger, and neither observed the leave-taking, heard the farewells, or saw the kisses on the depot platform, or heard the call, "Aunt, bring up the baby and the satchel." The plaintiff however contends that the leave-taking, farewells, and kisses on the depot platform occurred so near to the conductor

that he might notwithstanding his denial have heard them, or that in the exercise of ordinary care he ought to have observed them, and consequently to have known that the plaintiff was not a passenger, but intended to alight from the car platform before the train started, and that the conductor was therefore negligent in giving the signal to start without first ascertaining whether the plaintiff had descended.

If we assume for the purpose of this case, and as most favorable to appellant, that notwithstanding the denial by the conductor and by the brakeman that they observed these farewells, or knew that the plaintiff was not a passenger, there still was an issue of fact involving the question whether they had actually observed, or whether they ought to have observed the conduct of the plaintiff and the other passengers, still we think that the real probative effect of such conduct was not as claimed by the appellant. If farewells and kisses were exchanged on the depot platform, the fair inference would be that there the parting took place, and that those who remained on the platform were the friends who had taken leave, and those who boarded the train thereafter were the departing passengers. The daughter of plaintiff remained on the depot platform. All other members of the group ascended the steps of the smoking car. The plaintiff ascended last and in response to a request to bring up the baby and the satchel, but there was nothing in the request to inform any one who overheard it that she was not a passenger. It is a fair inference, although perhaps not a very strong one, that all those who board a train stopped at a station for the reception of passengers are passengers. In the absence of evidence to the contrary, the trainmen are justified in so presuming. We find no evidence here of any indications to the contrary. There was therefore no evidence upon which the jury would have been justified in finding that the defendant through its agents and servants, the conductor or brakeman, knew, or ought to have known, that the plaintiff was, at the time the conductor gave the signal to start, upon the train otherwise than as a passenger outward bound. There was therefore no negligence in starting the train. The case in this respect is ruled by Griswold *v.* C. & N. W. Ry. Co., 64 Wis. 652, 26 N. W. 101. So that, even conceding appellant's contention that plaintiff was rightfully on the train by customary invitation and that defendant owed her the duty of ordinary care, still there was no want of ordinary care within the general rule first herein stated. It follows that the judgment of the circuit court must be affirmed.

Judgment affirmed.

MILEY *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Montana, March 26, 1910.)

[108 Pac. Rep. 5.]

Appeal and Error—Dismissal of Action.—A motion by respondent to dismiss the action will not be granted by the Supreme Court on appeal, such court having authority to dismiss only actions or proceedings commenced therein.

Pleading—Special Statute—Proof.—One seeking recovery under a special statute creating a new liability must plead and prove the facts showing his right to recover under such statute.

Carriers—Carriage of Passengers—Contracts Limiting Liability—Reduced Fare.*—In the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket whereby its liability is restricted and its obligations curtailed.

Carriers—Failure to Stop at Station—Action for Statutory Penalty—Statutes—Construction.—Under Rev. Codes, § 4330, requiring railroad corporations, on tender of the "regular rates of fare," to furnish tickets entitling the purchasers to ride, and providing that any railroad failing to furnish tickets or refusing the passage which the same call for, must pay to the person so refused $200, one purchasing a ticket at a reduced rate may not recover the penalty on failure of the railroad to stop at the station named in the ticket.

Appeal from District Court, Park County; Frank Henry, Judge.

Action by Alta Miley against the Northern Pacific Railway Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed and remanded.

Wm. Wallace, Jr., John G. Brown, and *R. F. Gaines,* for appellant.

HOLLOWAY, J. During the month of July, 1908, the Northern Pacific Railway Company was operating a double train service over its Park branch, between Livingston and Gardiner. On that line of road, and between the regular stations at Emigrant and Electric, there is a flag station known as "Daileys." At the time

*For the authorities in this series on the power of a carrier of passengers to exempt itself from liability or limit its liability, see second foot-note of Eberts *v.* Detroit, etc., Ry. (Mich.), 28 R. R. R. 159, 51 Am. & Eng. R. Cas., N. S., 159; first foot-note of Clough *v.* Grand Trunk W. Ry. Co. (C. C. A.), 26 R. R. R. 660, 49 Am. & Eng. R. Cas., N. S., 660; first foot-note of Chicago, etc., Ry. Co. *v.* Mann (Neb.), 26 R. R. R. 288, 49 Am. & Eng. R. Cas., N. S., 288; Dugan *v.* Blue Hill St. Ry. Co. (Mass.), 26 R. R. R. 159, 49 Am. & Eng. R. Cas., N. S., 159; fifth head-note of Pierson *v.* Illinois Cent. R. Co. (Mich.), 24 R. R. R. 591, 47 Am. & Eng. R. Cas., N. S., 591.

in question passenger train No. 103, which left Livingston in the forenoon, did not stop at Daileys, but passenger train No. 101, which left Livingston in the afternoon, did stop at that point to let off or take on passengers. On July 4, 1908, the plaintiff purchased from the Northern Pacific ticket agent at Livingston a round trip ticket for passage to Daileys and return, and boarded train No. 103 for the purpose of making her journey. When the train conductor came to collect her ticket, he informed her that the train she was then on did not stop at Daileys, and she was thereupon forced to alight at Emigrant, which was the nearest station to Daileys at which the train did stop. She brought this action, and in her complaint assumes to state two causes of action; the first founded upon the defendant's common-law liability, and the second upon the provisions of section 4330 of the Revised Codes of Montana. The first cause of action seems to have been abandoned at the trial; at least the instructions given by the court only submitted to the jury the second cause of action, and upon that cause of action a verdict was returned in favor of the plaintiff for the statutory penalty of $200; and from the judgment entered on the verdict, and from an order denying it a new trial, the railway company appealed. The respondent did not make any appearance in this court, but apparently confessed error by asking this court to dismiss the action. This motion we cannot grant. It is only an action or proceeding commenced in this court that we have any authority to dismiss under any circumstances. To dismiss the appeals would amount to an affirmance of the judgment and order, and, as there are not any grounds urged for such action, we are left to consider on the merits the questions raised, or such of them as may be necessary to a determination of the appeals.

The evidence offered by the plaintiff discloses that the ticket she purchased was an excursion ticket, issued on account of the fourth of July holiday, and that it was sold to her for $1.20, whereas the regular round trip fare from Livingston to Daileys was $1.80. Section 4330, Revised Codes, under which this recovery was had, reads as follows: "Every railroad corporation must provide, and on being tendered the regular rates of fare, furnish to every person desiring a passage on their passenger cars, a ticket which entitles the purchaser to a ride, and to the accommodations provided in their cars, from the depot or station where the same is purchased, to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage

which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars."

We do not deem it advisable to determine some of the important questions suggested by appellant's brief. This cause has not been argued for respondent, and we reserve our decision upon those questions until such time as they may arise and be fully presented. Section 4330 creates a new liability, on the part of the railway company, where none existed before, and since this action was tried upon the theory of the company's liability under the statute, and not otherwise, the only question with which we need concern ourselves at this time is: Does the plaintiff make out a case entitling her to the penalty provided in that section? In Kelly *v.* Northern Pacific Ry. Co., 35 Mont. 243, 88 Pac. 1009, this court said: "In order to settle the rule in this state, we decide that, where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute." Of course, it follows that the proof must then conform to the facts pleaded.

It will be observed that section 4330 does not absolutely require the railway company to furnish a ticket good from Livingston to Daileys upon every train running upon the Park branch; at the utmost it can only be said that it makes such requirement provided the regular fare is tendered; and, as to whether the section goes to this extent, we reserve our decision. The plaintiff did not tender or pay the regular fare. She purchased an excursion ticket for which she paid a special or reduced fare; and that, in the absence of statutory restrictions, a railway company may for a reduced fare sell a particular form of ticket, whereby its liability is restricted and its obligations curtailed, is recognized by the authorities generally. Rose *v.* Northern Pacific Ry. Co., 35 Mont. 70, 88 Pac. 767, 119 Am. St. Rep. 836.

Since the plaintiff insists that she is entitled to recover the penalty provided by section 4330 above, by reason of the fact that she was not permitted, by virtue of the ticket she had purchased, to ride from Livingston to Daileys and to alight at that station from the train upon which she sought carriage, she must show that she met the requirements of that section, which have to do with the passenger as distinguished from the carrier; and, as we have just observed, the first requirement is that she should have tendered the regular fare for her ticket, and this she did not do. Our Constitution (section 7, art. 15), our Codes, this court, in Rose *v.* Northern Pacific Ry. Co., above, and Brian *v.* Oregon Short Line R. Co., 40 Mont. —, 105 Pac. 489, and the authorities generally, recognize the distinction between a ticket sold at the regular fare, and one sold at a reduced fare or special price. The plaintiff sought to make her journey upon train No. 103, and the trouble arose because that train would

not stop at Daileys to let her off. There is evidence that she was misled by the ticket agent; but that evidence has to do only with the first cause of action, which did not go to the jury. It could not have any application to the cause of action for the statutory penalty. Whatever right section 4330 may confer upon a passenger who has paid or tendered the regular fare for his ticket, it does not assume to confer any whatever upon a person who has purchased a ticket at a price below the regular fare, as plaintiff in this instance did; and since the plaintiff does not bring herself within the class of persons for whose benefit section 4330 was enacted, she cannot maintain an action for the penalty which that section provides.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

CONE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 18, 1910.)

[67 S. E. Rep. 779.]

Carriers—Loss of Baggage—Delivery to Carrier—Submission to Jury.*—In an action against a railroad for loss of baggage, evidence held sufficient to go to the jury on the issue as to whether the baggage was delivered to defendant as a common carrier.

Carriers—Loss of Baggage—Liability—Delivery and Acceptance.*—While the liability of a carrier for baggage does not begin until delivery and acceptance, it is not always necessary to show actual delivery and express acceptance, since there may be an implied or constructive delivery and acceptance.

Carriers—Loss of Baggage—Liability.*—The liability of a carrier for baggage may arise before the purchase of a ticket or demand for check to one intending to become a passenger, who has his baggage placed at the proper place on the station premises within a reasonable time before the departure of the train.

Carriers—Loss of Baggage—Delivery to Carriers—Time—Questions for Jury.*—Where plaintiff who intended to take a morning train had his trunk conveyed the night before to defendant's baggage room, while defendant's baggage agent was on duty, it could not be said as a matter of law that the trunk was deposited at the baggage room an unreasonable time before the departure of the train.

*For the authorities in this series on the question, what constitutes delivery of baggage to the carrier, see foot-note of Southern Ry. *v.* Bickley, etc., Co. (Tenn.), 29 R. R. R. 275, 29 Am. & Eng. R. Cas., N. S., 275.

Cone *v.* Southern Ry. Co

Carriers—Loss of Baggage—Delivery to Carrier—Reasonable Time—Question for Jury.*—What is a reasonable time before the departure of a train for the delivery of baggage to the carrier is, in an action for loss of the baggage, generally for the jury.

Carriers—Loss of Baggage—Delivery to Carrier—Evidence.*—In an action against a carrier for loss of a trunk, that defendant so far received the trunk as baggage as to check the same for the party stealing it was some evidence of delivery to defendant as carrier.

Carriers—Loss of Baggage—Contributory Negligence of Passenger—Sufficiency of Evidence.—In an action against a railroad for loss of baggage, evidence held not to show conclusively contributory negligence on plaintiff's part in placing his trunk at the accustomed checking place, and leaving it there for the night.

Carriers—Loss of Baggage—Damages—Instructions.—In an action against a railroad for loss of a trunk, where plaintiff testified that, after the trunk was recovered by defendant, he received it and contents on condition of no value on them; that the trunk was damaged; that a number of the articles therein were missing; and that the remainder with the exception of a few articles of small value were so damaged as to be worthless to him—a charge that plaintiff could not recover damages for the part of the baggage returned to him, the action being for loss of the baggage, and not for injury thereto by deterioration, was properly refused.

Damages—Pleading—Special Damages.†—In an action against a carrier for loss of baggage, damages resulting from depreciation of a suit of clothing by the loss of or damage to one article of the suit is not special damages when the whole suit was in the carrier's possession; and hence such damages are recoverable where general damages are claimed.

Appeal from Common Pleas Circuit Court of Spartanburg County; W. H. Hunt, Special Judge.

Action by P. D. Cone against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sanders & De Pass, for appellant.
Wilson & Osborne, for respondent.

JONES, C. J. The plaintiff recovered judgment against defendant for the value of a trunk and its contents, alleged to have been lost through the negligence of the defendant after receiving the same to be transported as plaintiff's baggage.

The main question presented by the appeal is whether there was any testimony that the trunk was ever delivered to de-

*See foot-note on preceding page.

†For the authorities in this series on the subject of pleading damages, see last foot-note of Lexington Ry. Co. *v.* Britton (Ky.), 33 R. R. R. 237, 56 Am. & Eng. R. Cas., N. S., 237.

fendant either as a common carrier or as a warehouseman. There was testimony that about 8 o'clock p. m. November 3, 1907, that plaintiff, intending to become a passenger on defendant's train due to leave about two hours later, sent his trunk to the station at Spartanburg, S. C. by a drayman of the R. D. Blowers' Transfer Company. A few minutes afterwards plaintiff concluded to take the morning train, as he understood the night train was more than an hour late, and telephoned to the drayman's place of business, giving instruction to place the trunk in defendant's transfer room or baggage room. The drayman deposited the trunk under the shed in front of the defendant's baggage room between the corner and door of the building where there were other trunks, and where the Blowers' Transfer Company was accustomed to deliver baggage to the defendant, and from which place defendant was accustomed to check baggage. Defendant's night baggage agent was then on duty, but it appears that the drayman said nothing to the agent with respect to this trunk. The next morning when plaintiff went to the station to have the trunk checked it could not be found. The answer in alleging contributory negligence of plaintiff stated that plaintiff negligently allowed the trunk to remain out under the shed exposed to persons, and that thereafter some one had the trunk checked; defendant believing the person who had the same checked to be the owner thereof. It was discovered that the trunk had been stolen.

On behalf of plaintiff there was testimony that the defendant company had charge of the trunk after it was deposited in the place which had been designated for the purpose, and on behalf of defendant there was testimony that defendant did not take charge until the owner had the same checked for transportation as baggage, or deposited in the parcel room kept for the storing of parcels, upon the payment of a small sum for storage for 24 hours. The drayman had no authority to place the trunk in the baggage room, and had been previously ordered to put all baggage intended to be checked on the outside where it was deposited. There was no evidence that it was contrary to the rules of the defendant company to deposit baggage at the place named at night for checking as baggage on the morning train. We think there was sufficient evidence of delivery to defendant as common carrier to require submission of that issue to the jury.

The general rule is that the liability of a carrier does not begin until delivery and acceptance of the goods, but it is not always necessary to show actual delivery and express acceptance, for there may be an implied or constructive delivery and acceptance, or the matter may be determined by the custom of the carrier. 4 Elliott on Railroads, § 1403; Hutchinson on Carriers, § 118. "The carrier may assent to the delivery of baggage

at its station without notice to its agents, and this assent may be implied from its custom and course of business in allowing baggage to be deposited in its depots; but whether such delivery is to be regarded as binding the carrier is a question of fact for the jury to determine." 3 Ency. Law (2d Ed.) 563; Merriam *v.* Hartford, etc., R. R. Co., 20 Conn. 354, 52 Am. Dec. 344; Hickox *v.* Naugatuck R. R. Company, 31 Conn. 281, 83 Am. Dec. 143. Such liability may arise before the purchase of a ticket or demand for check to one intending to become a passenger who has his baggage placed at the proper place on the station premises within a reasonable time before the departure of the train. Lake Shore, etc., R. R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Coffee *v.* Louisville, etc., R. R. Co., 76 Miss. 569, 25 South. 157, 45 L. R. A. 112, 71 Am. St. Rep. 535. It cannot be said as matter of law under the circumstances of this case that the trunk was deposited at the baggage room and checking place an unreasonable time before the departure of the train. Goldberg *v.* Ahnapee, etc., Ry. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899, cited by appellant. What is such reasonable time is generally a question for the jury. Moreover, the alleged fact that defendant so far received the trunk as baggage as to check the same for the party stealing it that night is some evidence of delivery to the defendant as carrier.

The foregoing views render it unnecessary to consider whether there was evidence of its negligence in that regard. We may say, however, that, if the liability of the defendant should be held to be as warehouseman, there was some evidence of its negligence in leaving the baggage exposed unguarded and in checking the trunk for the party stealing it. There was no conclusive evidence of contributory negligence on the part of plaintiff in placing the trunk at the accustomed place, and leaving it there for the night. If it be true, as alleged, that defendant checked the trunk from the accustomed place, and thereby put it in the power of the thief to appropriate it, defendant's own act, although inadvertently or ignorantly done, must have been considered by the jury in determining the proximate cause of plaintiff's loss.

Defendant requested the court to charge the jury: "(9) If the jury should find that the railroad company is responsible for the loss of plaintiff's baggage, they are instructed that they cannot give any damages for the part of plaintiff's baggage which was returned to him, as this action is brought for the loss of such baggage, and not for any damage or injury done thereto by deterioration," etc. The refusal of the court to charge as requested is assigned as error. The testimony was to the effect that the trunk and some of its contents were recovered some six weeks after the theft, and delivered to plaintiff. The plain-

tiff testified that he received the trunk and contents on condition of no value on them. Plaintiff testified that the trunk itself was damaged; that a number of the articles therein were missing; that the remainder of the contents, with the exception of a few articles of small value, were so damaged as to be worthless to him. In view of such testimony, the charge was properly refused.

Nor can we say there was error of law in refusing the motion for new trial, made on the ground that plaintiff should remit from the verdict the value of the articles recovered and delivered to plaintiff. The general damages claimed in the complaint, the value of the trunk, and contents consisting of the wearing apparel, pictures, papers, etc., amounted to $323.50, and we cannot say the verdict for $250 was without any support in the testimony.

The damages resulting from depreciation of a suit of clothing by the loss of or damage to one article of the suit are not special damages when the whole suit was in the possession of the carrier. Harzburg *v.* Southern Ry., 65 S. C. 541, 44 S. E. 75; Sonneborn *v.* Southern Ry., 65 S. C. 502, 44 S. E. 77.

The judgment of the circuit court is affirmed.

YOUNG *et ux.* *v.* SOUTHERN RY. CO.

(Supreme Court of Mississippi, April 18, 1910.)

[52 So. Rep. 19.]

Railroads—Injuries to Person on Track—Liability.*—A railroad maintained at a station residences fronting on the roadbed for the occupancy of its employees and their families. The usual way of ingress to and egress from the residence was over the track, and the railroad knew and permitted it. It was the custom of the children of the employees to play on the track in front of the residences, and this was known to the railroad. Held, that a child of an employee was, when on the track, more than a mere licensee, and the railroad was liable for injuries occasioned by simple negligence in the operation of its trains.

Appeal from Circuit Court, Washington County; J. M. Cashin, Judge.

*For the authorities in this series on the question, who are trespassers, and who are licensees, on a railroad's track or premises, see last foot-note of St. Louis, etc., Ry. Co. *v.* Lavendusky (Ark.), 32 R. R. R. 97, 55 Am. & Eng. R. Cas., N. S., 97; last foot-note of Thompson *v.* Aberdeen & A. R. Co. (N. Car.), 32 R. R. R. 95, 55 Am. & Eng. R. Cas., N. S., 95.

Young *v.* Southern Ry. Co

Action by J. E. Young and wife against the Southern Railway Company in Mississippi. From a judgment sustaining a demurrer to the amended declaration, and dismissing the action, plaintiffs appeal. Reversed and remanded.

The amended declaration reads as follows:

"First Count. Comes James Young and Viney Young, plaintiffs, and complain of the Southern Railway Company in Mississippi, a corporation under the laws of the state of Mississippi, owning and operating a line of railroad through the county aforesaid, with stations, depots, and depot agents therein, defendant, in action on the case, for that heretofore, to wit, long before and at the time of the committing of the wrongs and injuries herein complained of said defendant owned and operated said line of railroad through said county as aforesaid extending by and through a station or town therein known as Elizabeth; that on or about the 4th day of March, 1908, and while said defendant was owning and operating said line of railroad near and at the station aforesaid, it did then and there carelessly and negligently, by and through its employees, run its engine and cars over and against and upon one Jimmie Young, the infant child of plaintiffs, who then was the age of two and a half years of age, and who was on the said track, and thereby injured, bruised, and maimed said child, so that it afterwards died from such injuries, to plaintiffs' damage in the sum of $15,000. Wherefore they bring their suit.

"Second Count. Plaintiff further complains of the defendant in this action, for that he says that at the time of the committing of the wrongs and injuries herein complained of, wherefore, that on the 4th day of March, 1908, and for a long time prior thereto, defendant was and had been operating its said railway to and across the tracks of the Yazoo & Mississippi Valley Railway Company at the station of Elizabeth, in the county and state aforesaid, at which a union depot of said two railway companies is situated; that for a long time prior to said date defendant had maintained at said station, and a short distance west thereof, and on the south side of defendant's tracks, and immediately adjacent thereto, some four or more places of residence facing to and fronting on and touching the roadbed of defendant's track, and for the use and occupation of its employees engaged in the maintenance of its roadbed and track, one of whom was James Young, plaintiff, together for the use and occupation of themselves and their families and children, one of which said employees was plaintiff, who had three children, all of whom, with Viney Young, wife of James Young, and one of the plaintiffs, resided in one of said places of residence so kept and maintained by said defendant as aforesaid; that one of the main and usual ways of ingress to and egress

from the premises occupied by plaintiffs and their children was over and along the track of said defendant, all of which was well known to defendant, and by it permitted unto plaintiffs and their children as tenants and employees of defendant as aforesaid, and all of which existed at the time of the committing of the wrongs and injuries herein complained of, and was known to defendant; that at the time and on account of the facts herein stated the defendant and its employees operating its engines and trains along said road became and was in duty bound to plaintiffs and their said children, and owed to them a duty of ordinary care, then to keep a reasonable safe lookout or watch for plaintiffs and their children as they might pass over and along said tracks, as aforesaid, so that defendant would not run plaintiffs and their children down, injure or kill them, or any of them; that in violation of its duties aforesaid, at the place aforesaid, to plaintiffs and their children as aforesaid, owing by the defendant as aforesaid, to them as aforesaid, the defendant, through its employees, at the place aforesaid, on the date aforesaid, negligently and without the exercise of ordinary care ran one of defendant's engines and trains over plaintiffs' infant child, Jimmie Young, of the age of two and a half years of age, who was at that time passing over and on said track of said defendant, and was upon said track or immediately there against, greatly injuring said child, from which said injuries it died, to plaintiffs' damage in the sum of $15,000. Wherefore they sue.

"Third Count. Plaintiff further complains of defendant in this action for at the time of the commission of the wrongs and injuries herein complained of, while it was operating its said line of railway through the county aforesaid, and through the town and station aforesaid, said railway so operated was the main line of defendant; that it crossed the main line of the Yazoo & Mississippi Valley Railroad Company at said station of Elizabeth; that around said station at said time had been and was existing a considerable town; that at the time of the commission of the wrongs and injuries herein complained of plaintiff lived in a box car furnished by said company to James Young, plaintiff, as a residence for himself and his wife and children; that said box car situated on the south side of the railroad track of said defendant, and 200 feet west of said junction of said two railroads, and a few feet from said track of the main line of defendant; that nearly at the same place and on the same side of said railway track were situated four or five other cabins and box cars, which were used by the employees of said railway company in the same manner and way as that one used by James Young, plaintiff; that at the time the said James Young was employed by said railroad company as a section hand, by said railroad company provided with said

box car as a house to live in; that long before and at the time of the commission of the wrongs and injuries herein complained of it had been the custom of the children of plaintiff and the children of other employees of said defendant living in said other cabins and box cars to at times escape from the custody of their parents, including plaintiff, and go upon said railway tracks of said defendant in front of said cabins and box cars, and eastward as far as defendant's depot, situated at the crossing of said two railroads aforesaid, and go to and fro upon said track and play thereon, all of which was well known to the defendant; that under the foregoing state of case then existing it became and was the duty of the defendant, owing to said children and to plaintiff while operating its train to and fro over and along its track at the place aforesaid, to exercise reasonable care in keeping a lookout for such children, including those of plaintiff, so as not to run them down and kill them, or injure or maim them; that, notwithstanding said duty as aforesaid, the defendant negligently and carelessly, without exercising reasonable care in keeping a lookout, or a reasonably safe lookout, for such children, including plaintiff's, did on or about the 4th day of March, 1908, run one of its trains, composed of an engine and cars, against, upon, and run down one of plaintiff's said children, to wit, Jimmie Young, an infant of two and one half years of age, which had escaped from those intrusted with the custody of it, and gone upon the edge of said track, thereby greatly maiming and bruising said infant, from which injuries it died, to the damage of plaintiffs, who are the father and mother of said child, in the sum of fifteen thousand dollars. Wherefore they bring this suit.

"Fourth Count. Plaintiff further complains of defendant in this action for that heretofore, to wit, at the time of the commissions of the wrongs and injuries herein complained of, and for along time therefore, the defendant was operating its said line of railway through the county and state aforesaid, and through the town or station of Elizabeth, at which place the defendant's main line of railway crosses the main line of the Yazoo & Mississippi Valley Railway; that at the time of the committing of the said wrongs and injuries, and for a long time prior thereto, there was a considerable town built up around said station of Elizabeth, and on either side of the railway track of defendant west of said crossing, with streets and roads laid out therein, some of which crossed said track of said road on the west side of said crossing; that about three hundred feet west of said crossing, and on the south side of said defendant's said track, was situated some four or five or more cabins or box cars used as cabins for the occupancy of the section hands then employed by the defendant in the maintenance of its roadbed, one of which was occupied by the plaintiff's, James Young and

Viney Young, his wife, same having been furnished to the said James Young and Viney Young by said defendant as such residence or living house; that with plaintiffs in said house lived their three children, one of which was named Jimmie Young, a girl then two and a half years of age; that for a long time before and at the time of the committing of said wrongs and injuries it was the habit of the people living around and immediately at said station of Elizabeth to gather upon, stand around and on, and walk over the track of the said defendant extending from said crossing westward to and past the cabin or box car occupied by plaintiffs; that it was also the habit at that time and for a long time prior thereto of the people living in said box cars and cabins of defendant's company, including their children, and including the children of plaintiffs, to also go upon said tracks, to walk up, over and along the same, to play upon the same at the place aforesaid, from said crossing westward to and past said box car or house occupied by plaintiffs, all of which foregoing facts and conditions were well known to the defendant at the time of the committing of said wrongs and injuries, and for a long time prior thereto. That by reason of the premises aforesaid, facts aforesaid, condition aforesaid, the habits and customs of the people aforesaid, and the habits of the children aforesaid, including the infant child of plaintiffs, Jimmie Young, aforesaid, known to said defendant as aforesaid, it became and was the duty of defendant, in operating its trains aforesaid over and along its said track at the place aforesaid, to use ordinary care in keeping a lookout at the place aforesaid, to use ordinary care in keeping a lookout for said people, said children including said infant child of plaintiffs, so as not to run them down, injure or destroy them, or to run any of them down, injure or destroy them, including said infant, Jimmie Young, which duty was also owing plaintiffs as the father and mother of said child. Plaintiffs aver that, notwithstanding the duty or duties owing to the plaintiff as aforesaid, the defendant did, on the 4th day of March, 1908, carelessly and negligently, and without the exercise of ordinary care, run one of its trains against and over said infant of plaintiffs, Jimmie Young, of the age of two and a half years, and so bruised, crushed, and maimed it that it died soon thereafter from said injuries, to plaintiff's damage in the sum of fifteen thousand dollars. Wherefore they bring this suit."

Defendant filed this demurrer to the amended declaration:

"Now comes the defendant in the above-styled cause, by its attorneys, and demurs to the amended declaration filed herein, and prays the judgment of this court whether it shall make further answer thereto, and for grounds of demurrer would show: (1) The said amended declaration states no cause of action against this defendant. (2) The amended declaration

shows that the person for whose death suit was brought was a trespasser or licensee upon the track of this defendant, and does not allege that she was wantonly or willfully injured by defendant. (3) The said amended declaration of plaintiffs shows that the person for whose death suit was brought was a trespasser or licensee upon the track of this defendant, and does not allege that the employees of the company failed in their duty towards said person after discovering her peril. (4) The suit is brought for the death of Jimmie Young, and the allegations of the amended declaration show that Jimmie Young was a licensee or trespasser upon the track of the defendant company, and the failure of duty complained of was failure of defendant to keep a reasonably safe lookout on watch for said Jimmie Young, and defendant alleges that no duty was required of it to keep a lookout or watch for said Jimmie Young. (5) And for other causes to be assigned on the hearing of this demurrer."

Lamar Watson and *Hugh C. Watson,* for appellants.
Catchings & Catchings, for appellee.

MAYES, J. The demurrer to the amended declaration filed in this case ought to have been overruled. The declaration contains much that is unnecessary for the purpose of stating a cause of action; but, taking into consideration the whole declaration, a case of negligence is sufficiently stated, making the railway company liable if the facts stated are sustained by the proof. Under the allegations the infant was more than a mere licensee, and the case of Railroad Company *v.* Arnola, 78 Miss. 788, 29 South. 768, 84 Am. St. Rep. 645, does not settle the law of this case.

Reversed and remanded.

SOUTHERN RAILWAY COMPANY, Ed. S. Hurst, Benj. Voils, and Tom Cox, Plffs. in Err., *v.* W. M. MILLER.

(Argued March 3, 1910. Decided April 4, 1910.)

[30 Sup. Ct. Rep. 450.]

Removal of Causes—Separable Controversy.*—A suit in which plaintiff, in good faith, has joined as for a joint liability in tort a foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of, is not removable to a Federal circuit court as presenting a separable controversy between the plaintiff and the corporate defendant.

Removal of Causes—Dismissal by Federal Court—New Action in State Court.—The voluntary dismissal of an action which has been removed from a state court to a Federal court does not preclude a subsequent suit on the same cause of action in the state court.

In error to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Hall County, in that state, in favor of plaintiff in a suit in which plaintiff has joined, as for a joint liability in tort, a foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of. Affirmed.

See same case below, 3 Ga. App. 410, 59 S. E. 1115.

The facts are stated in the opinion.

Messrs. John J. Strickler, Alfred P. Thom, Hamilton McWhorter, and *McDaniel, Alston, & Black,* for plaintiffs in error.

Messrs. Reuben R. Arnold and *Reuben Arnold,* for defendant in error.

Mr. Justice DAY delivered the opinion of the court:

The defendant in error, plaintiff below, brought suit in the city court of Hall county, Georgia, against the Southern Railway Company, a corporation of Virginia, and certain individual citizens of Georgia, to recover damages for personal injuries received by him while in the employ of the railroad company as an engineer. A recovery in the court of original jurisdiction was affirmed in the court of appeals of Georgia (3 Ga. App. 410, 59 S. E. 1115), and the case is brought here to review certain Federal questions presented by the record. These are, first, that the state court erred in refusing to remove the case to the United States circuit court upon the petition of the plaintiff in error; second, as it appeared that the case had once been removed to the Federal court and was dismissed by the plaintiff,

*See foot-note of Alabama Great Southern Ry. Co. *v.* Thompson (U. S.), 24 R. R. R. 292, 47 Am. & Eng. R. Cas., N. S., 292.

the state court should have held that the right to further prosecute in that court was lost, and the jurisdiction completely and finally transferred to the Federal court.

In order to determine these questions, it is necessary to state how the case arose. Originally this suit was brought against the Southern Railway Company alone, to recover damages for injuries charged to have been inflicted, because the train upon which the plaintiff was engineer was permitted to run from the main track through an open switch, onto a siding, where another train was standing, when, by reason of the rules and regulations of the company in the circumstances set forth, plaintiff's train had the right of way upon the track, and, because the switch was turned the wrong way, plaintiff's train was thrown into the siding upon which the other train was standing, and in order to avoid more serious injury, plaintiff jumped from his engine, and was greatly injured.

The first suit, being against the Southern Railway Company alone, was removed to the United States circuit court, the transcript of record was duly filed, and the company answered. Thereafter the plaintiff voluntarily dismissed the case, and later began the present case against the Southern Railway Company for the same injury, and enjoined Cox, Voils, and Hurst as parties defendant. These parties were, respectively, the conductor of the train with which plaintiff's train collided, the engineer and front brakeman of said train. The negligence charged was that the brakeman negligently failed to turn the switch back to the main line after his train went into the siding; that Cox, the conductor, was in control and management of the train, and under the duty of seeing that the switch was turned to the main line; and that Voil, the engineer, after he got his engine into the siding, with the exercise of ordinary care should have known that the switch was turned wrong, and yet failed to take any steps to report the situation or to have it remedied. It was further alleged that the individual defendants, in causing the switch to be unlocked and turned from the main line, were guilty of negligence, which was the negligence of the railroad company, inasmuch as they represented the company in the operation of the train which collided with the plaintiff's train. It is also alleged that the individual defendants should have flagged the plaintiff's train if, for any reason, the switch remained turned to the side track.

The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States court, or with a view to defeat a removal thereto. The case here presented is one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort.

Under the practice in Georgia, the case went to the court of appeals of that state on the question of the right to remove the case to the Federal court. The decision of the court of appeals upon that question is reported in 1 Ga. App. 616, 57 S. E. 1090. In that case, the court dealt with the right, under the law of Georgia, to join the individual defendants with the railroad company, and held that the objections to joinder were untenable, and that there was no separable controversy, either at common law or under the statutes of Georgia. In an opinion by the chief judge it was held that the acts of negligence charged against the individual defendants involved both acts of omission and commission, and were not merely matters of nonfeasance, for which the agents would not be jointly liable with the principal. The court further held that the objection that the liability of the railroad company was statutory, and that of the other defendants at common law, made no difference in the right to join the defendants, and that, under the statute law of Georgia, the acts of negligence set out in the declaration against the individual defendants may have amounted to criminal negligence, in which event both the railroad company and the individual defendants were jointly liable to the plaintiff under the law of the state. In view of the conclusions which the learned court reached, it further held that the case was ruled by Alabama & G. C. R. Co. *v.* Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147. We agree with that conclusion. In that case it was held that, for the purposes of determining the removability of a cause, the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings. See also Cincinnati, N. O. & T. P. R. Co. *v.* Bohon, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1,152. There was no error in the refusal to remove the case.

A further objection is made that, inasmuch as the suit was once removed from the state court to the Federal court, and therein dismissed, there was no right to begin the case again in the state court. This agreement is predicated upon the statement in a number of cases in this court, to the effect that where the petition for removal and bond have been filed, the state court loses jurisdiction of the case, and subsequent proceedings therein are void and of no effect. But this is far from holding that a Federal court obtains jurisdiction of a suit thus removed in such wise that it can never again be brought in a state court, although there has been no judgment upon the merits in the Federal court, and the case has been dismissed therein without any other disposition than is involved in a voluntary dismissal with the consent of the court.

While it is true that a compliance with the act of Congress entitling the party to remove the case may operate to end the

jurisdiction of the state court, notwithstanding it refuses to allow such removal, it by no means follows that the state court may not acquire jurisdiction in some proper way of the same cause of action after the case has been dismissed without final judgment in a Federal court. By complying with the removal act, the state court lost its jurisdiction; and upon the filing of the record in the Federal court, that court acquired jurisdiction. It thereby had the authority to hear, determine, and render a judgment in that case to the exclusion of every other court. But where the court permitted a dismissal of the action by the plaintiff, it thereby lost the jurisdiction which it had thus acquired.

We know of no principle which would permit the Federal court under such circumstances, and after the dismissal of the suit, to continue its jurisdiction over the case in such wise that no other court could ever entertain it. After the voluntary dismissal in the Federal court, the case was again at large, and the plaintiff was at liberty to begin it again in any court of competent jurisdiction.

We find no error in the judgment of the Court of Appeals of Georgia, and the same is affirmed.

Affirmed.

CONCHIN *v.* EL PASO & S. W. R. CO.

(Supreme Court of Arizona, April 2, 1910.)

[108 Pac. Rep. 260.]

Master and Servant—Injuries to Third Person—Acts within Scope of Employment.*—Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in the performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master is liable, though the act be in excess of the authority conferred by him or in violation of his express directions, provided it was not done in furtherance alone of the servant's personal ends.

*For the authorities in this series on the question whether a master's liability for the acts of his servant depends upon whether they were committed within the scope of his employment, see foot-note of McKain *v.* Baltimore & O. R. Co. (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542; first foot-note of Jones *v.* Seaboard A. L. Ry. Co. (N. Car.), 32 R. R. R. 139, 55 Am. & Eng. R. Cas., N. S., 139; Hypes *v.* Southern Ry. Co. (S. Car.), 32 R. R. R. 145, 55 Am. & Eng. R. Cas., N. S., 145; first foot-note of St. Louis, etc., R. Co. *v.* Lavendusky (Ark.), 32 R. R. R. 97, 55 Am. & Eng. R. Cas., N. S., 97.

Conchin *v.* El Paso & S. W. R. Co

Master and Servant—Injuries to Third Person—Acts within Scope of Employment.†—A servant employed as a watchman to protect railroad property and to eject trespassers has implied authority to use force when necessary, and hence in shooting a trespasser on the property such servant acted within the scope of his employment.

Railroads—Injury to Trespasser.‡—A railroad is liable to a trespasser on its grounds only for willful or wanton injury.

Negligence—"Willful"—"Wanton."§—An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, however, more comprehensive, and to constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it sufficing that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely and not improbable result of the wrongful act.

Master and Servant—Injury to Third Person—"Wantonness."—A railroad watchman employed to guard the railroad property and keep off trespassers, and who, on a trespasser's failing to halt when commanded so to do, fired on and shot the trespasser, was guilty of conduct constituting "wantonness."

Railroads—Injury to Trespasser—Contributory Negligence.—A trespasser on railroad property, who was shot by a railroad watchman, was not guilty of contributory negligence in failing to halt when called on so to do by the watchman.

Appeal from District Court, Cochise County; before Justice Doan.

Action by John Conchin against the El Paso & Southwestern Railroad Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. B. Cleary, for appellant.
Herring, Sorin & Ellinwood, for appellee.

DOE, J. The plaintiff (here appellant) brought his action seek-

†For the authorities in this series on the question, what acts of an employee are, and are not, within the scope of his employment, see last paragraph of foot-note of Yazoo, etc., Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54; last head-note of Kunza *v.* Chicago & N. Ry. Co. (Wis.), 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347.

‡For the authorities in this series on the subject of the duties and liabilities of a railroad company with respect to licensees and trespassers on its premises, see foot-note of Rowley *v.* Chicago, etc., Ry. Co. (Wis.), 30 R. R. R. 732, 53 Am. & Eng. R. Cas., N. S., 732; Watson *v.* Manitou, etc., Ry. Co. (Colo.), 29 R. R. R. 363, 52 Am. & Eng. R. Cas., N. S., 363.

§See last foot-note of Birmingham, etc., Co. *v.* Landrum (Ala.), 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593; last foot-note of Bussey *v.* Charleston, etc., R. Co. (S. Car.), 24 R. R. R. 460, 47 Am. & Eng. R. Cas., N. S., 460.

ing to recover damages from the defendant for injuries inflicted by a watchman in its employ. In the first cause of action plaintiff, in substance, alleges: That the defendant employed one Stafford as watchman of all its property at certain railroad yards on its line of road, to guard its said property from depredations, to apprehend and turn over to a peace officer for arrest all persons who he believed had committed or attempted to commit any depredation upon its said property, to ascertain the identity of and to keep off and frighten away from said premises and property all persons acting in a suspicious manner, and armed him with a revolver to carry out his said employment. That plaintiff, about 3 o'clock in the morning, while passing the place where Stafford was stationed as such watchman in a peaceable manner, and without having committed or intending to commit any depredation upon its property, was fired upon by Stafford, who called to him to halt, but that plaintiff, being frightened, ran. That Stafford continued to fire towards him and hit him in the knee, but that Stafford did not intend to hit, but only to frighten him. For a second cause of action, in addition to the foregoing matters, plaintiff alleges that Stafford was, at the time, a deputy sheriff, but does not allege that he was acting in such a capacity at the time of the acts complained of. Defendant filed general demurrers which were sustained, and, plaintiff declining to amend, judgment was rendered for defendant, and from said judgment plaintiff prosecutes this appeal. His only assignment of error is predicated upon the action of the court in sustaining the demurrers.

The question presented by this appeal may most conveniently be determined by a consideration of the propositions advanced by appellee in support of its demurrers and in the order stated; the same being: First. That the acts complained of were without the scope of the watchman's employment. Second. That the complaint was fatally defective in failing to negative that the plaintiff was a trespasser; the injuries having been inflicted upon the premises of the defendant and the action based upon mere negligence. Third. That the plaintiff, being a trespasser to whom the defendant owed no duty except not to wantonly or willfully inflict injury upon him, the complaint is defective, in that it fails to charge wanton or willful injury and alleges mere negligence on the part of the defendant. Fourth. That by running away instead of stopping when challenged plaintiff was guilty of such contributory negligence as to prevent recovery.

While plaintiff's allegations that the acts complained of were within the scope of Stafford's employment are mere conclusions and to be treated as surplusage, yet all allegations of fact contained in the complaint which are properly pleaded must, for the purpose of this case, be treated as true. It is alleged in the complaint that Stafford was employed as a watchman to pro-

tect the defendant's premises and property from depredation, to ascertain the identity of persons who might commit or attempt to commit such depredation, "to apprehend and turn over to a peace officer for arrest all persons who he had reason to believe or did believe had committed or attempted to commit any crime against the property," to keep off and frighten away from the property all persons acting in a suspicious manner, and "that said Stafford was armed by defendant with a revolver to carry out his said employment."

The words "within the scope of his employment" as applied to the liability of a master for the wrongful acts of his servant, are probably not susceptible of any satisfactory definition of general application; each case must be determined by the particular facts and circumstances surrounding it. Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in the performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master will be liable, even though the act be in excess of the authority conferred by him or in violation of his express directions, provided, however, that it is not done in furtherance alone of the personal desires or ends of the servant.

The intent with which an act is done affords a more reliable test as to whether it is within the scope of the servant's employment than do the methods of its accomplishment. The nature of Stafford's employment carries with it an implied authority to use force when necessary. "And even where the master owes no duty to the person injured, the authority to use force may be implied from the nature of the employment so as to render the master liable, even though the servant goes beyond the necessity of the situation and uses more force than necessary. For instance, the authority to use force is ordinarily implied where the employee is a watchman or doorkeeper." 26 Cyc. 1541. In Rogahn *v.* Moore Manufacturing & Foundry Co., 79 Wis. 573, 48 N. W. 669, the court says: "Where the servant is authorized to use force against another when necessary in executing his master's orders or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if through misjudgment or violence of temper the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have been acting beyond the line of his duty, or to have departed from his master's business." The New York Court of Appeals has said: "It is in general sufficient to make the master responsible that he gave to the servant authority, or made it his duty to act in respect to the business in which he

was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders." Rounds v. Railroad Co., 64 N. Y. 129, 21 Am. Rep. 597.

Applying the foregoing tests to the facts alleged in the complaint, it seems clear that Stafford was not acting independently, but strictly within the scope of his employment.

Counsel for appellee, in his second proposition, assumes that the complaint is based upon simple negligence. If this assumption be true, the complaint is fatally defective in failing to show any right or license for plaintiff's presence upon the defendant's premises, for clearly the defendant would not be liable to a trespasser for injuries due to its mere negligence. The plaintiff, however, could, at most, have been a trespasser to whom the defendant would be liable for willful or wanton injury, which brings us to a consideration of appellee's third proposition.

In many cases the words "willful" and "wanton" are treated as synonymous, and in those cases where an attempt has been made to distinguish them it has usually been with reference only to the facts of the particular case. An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, we think, more comprehensive than "willful." To constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely and not improbable result of the wrongful act. The word "likely" is here used in the sense of something more than possible and less than probable. "Wantonly. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice." 2 Bouvier, 1207.

The complaint expressly negatives any intent to inflict injury, and consequently eliminates the element of willfulness from our consideration. It only remains to consider whether the pleader has negatived wantonness as well. We think he has fallen a little short of so doing. Stafford had no right to arrest the plaintiff under the circumstances alleged in the complaint. Chapter 3, tit. 5, Cr. Code (Rev. St. 1901). The injury is alleged to have been inflicted in the night while the plaintiff was, at most, a mere technical trespasser upon defendant's right of way and was guiltless of the commission or intent to commit any crime, and while he was retreating to avoid apprehension or arrest, or,

as he may well have thought, a felonious assault. In firing towards and near the plaintiff while he was running, and in the nighttime though without intending to hit him, but only intending to try to halt or frighten him away, Stafford must have known that injury was the not improbable but likely result of his wrongful act, and displayed a reckless disregard of the rights of plaintiff and a disregard of and indifference to results constituting wantonness.

Appellee's fourth proposition is obviously without merit. There is nothing in the complaint from which a duty on the part of plaintiff to halt may be implied.

Plaintiff, in his second cause of action, alleges that Stafford was a deputy sheriff; but the facts stated do not indicate that he acted in such capacity, but clearly show that at the time of the injury he was acting in the capacity of watchman.

For the foregoing reasons, the judgment of the district court is reversed, and the cause remanded for further proceedings.

KENT, C. J., and CAMPBELL and LEWIS, JJ., concur.

YOUNG v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, Division No. 1, March 1, 1910.)

[127 S. W. Rep. 19.]

Constitutional Law—Due Process of Law—Liability for Personal Injuries.—Rev. St. 1899, § 2864, as amended by Acts 1905, p. 135 (Ann. St. 1906, p. 1637), providing that when a person shall die from an injury received through the negligence of any person engaged in running a locomotive, car, etc., the owner of the vehicle "shall forfeit and pay as a penalty * * * the sum of not less than $2,000 and not exceeding $10,000 in the discretion of the jury," is not a delegation to the jury of the legislative power of fixing penalties so as to deprive one liable of his property without due process of law, in violation of Const. Mo. art. 2, § 30 (Ann. St. 1906, p. 166), and Const. U. S. Amend. 14.

Master and Servant—Injury to Servant—Injury Avoidable Notwithstanding Contributory Negligence.—Where a servant was killed on a railroad track at a place where the master's trainmen had a right to a clear track, and they had no cause to suspect that the track would not be clear, the case is not one in which the master is liable if the trainmen saw, or by the exercise of ordinary care could have seen, the position of danger in due time, but one which the master is liable only if the trainmen saw decedent in time to have avoided the accident under the conditions and with the means at hand and failed to do so.

Young *v.* St. Louis, etc., Ry. Co

Evidence—Opinion Evidence—Effect.—In weighing opinion evidence as to the time and space required in which to stop a railroad train, jurors are bound to exercise their own common sense, and they are not bound to believe that a train could be stopped within a given space merely because a witness so testified.

Master and Servant—Injury to Servant—Contributory Negligence.*—Where defendant's sectionman, after dismounting from his railroad velocipede on which he was riding on the approach of a train and reaching a place of safety, returned to remove the velocipede, and was thus killed, his contributory negligence is a complete defense to an action for his death.

Master and Servant—Injury to Servant—Contributory Negligence—Question for Jury.—Where the evidence, in an action for the killing of a section foreman by defendant's train, in conflicting whether decedent was guilty of such contributory negligence as to bar recovery for his death, the question is for the jury.

Master and Servant—Injury to Servant—Duty of Master to Avoid Injury.†—A railroad company owes its sectionman who is guilty of contributory negligence in the performance of his work of inspecting the track no greater duty to have its engineer avoid injuring him, after discovering his peril, than it owes a trespasser.

Master and Servant—Injury to Servant—Actions—Instructions.—An instruction, in an action for the death of a railroad sectionman, which permits the finding of negligence from the failure of the engineer to sound the whistle is error, where the evidence shows that the sounding of the whistle would have been useless, and that the accident could have been avoided only by stopping the train.

Trial—Instructions—Refusal of Request.—The refusal of instructions fully covered by instructions given is not error.

Negligence—Nature and Element of "Negligence."‡—Degrees of negligence are not recognized; for, though the terms "wanton, willful, and reckless" are sometimes used in characterizing conduct, yet the law applies only the word "negligence," which is a failure to perform a duty, and though the law recognizes degrees in care, very high care, and ordinary care, the failure to exercise the highest degree of care required is only negligence, though failure to exercise ordinary care is also negligence.

Death—Action for Wrongful Death—Damages and Penalties—Elements.—In assessing the penalty under Rev. St. 1899, § 2864, as amended by Acts 1905, p. 135 (Ann. St. 1906, p. 1637), for wrongful death from the negligent operation of a locomotive, the jury may

*See extensive note, 33 R. R. R. 673, 56 Am. & Eng. R. Cas., N. S., 673; extensive note, 34 R. R. R. 733, 57 Am. & Eng. R. Cas., N. S., 733.

†See last foot-note of Langenfeld *v.* Union Pac. R. Co. (Neb.), 34 R. R. R. 727, 57 Am. & Eng. R. Cas., N. S., 727.

‡See extensive note, 17 R. R. R. 258, 40 Am. & Eng. R. Cas., N. S., 258.

consider the conduct of the negligent person beyond the mere finding of negligence, such as whether the conduct which resulted in the accident arose from mere inattention, or was willful, wanton, or reckless.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by A. G. Young, administrator of Pansy Middleton, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. Plaintiff had judgment, and defendant appeals. Reversed.

M. L. Clardy and *Edw. J. White,* for appellant.
John H. Flannigan, R. A. Mooneyham, and *R. M. Sheppard,* for respondent.

VALLIANT, J. This suit was instituted by Pansy Middleton in her lifetime, then a minor, suing by her curator. She recovered a judgment for $5,000 against the defendant for the death of her father, whose death she alleged was caused by the negligence of the servants of the defendant railroad company in operating one of its trains. After the cause was brought to this court by defendant's appeal the plaintiff died, and the cause was revived here, to be prosecuted in the name of A. G. Young, the administrator of her estate. The petition states that the plaintiff's father was in the service of the Missouri Pacific Railway Company as a section hand. A part of his duties was to go over a section of the road at times and inspect its condition. That on the day in question he was passing over the road on a railroad velocipede, commonly called a "speeder," when he was struck by an engine drawing a train of cars belonging to the defendant, the Iron Mountain Railway Company, and killed. That defendant company was running its train over the Missouri Pacific Company's track by license to do so. The statement of the cause of action is that the servants of the defendant company saw the deceased on the track, saw that he was unaware of the near approach of the train, and they then and there became aware of his perilous position in time to have prevented striking and injuring him by the exercise of ordinary care, by stopping or placing their train under control, or sounding the usual danger signals, but "negligently, willfully, and wantonly" failed to use the appliances at hand to stop or place the train under control or sound the danger signal, failed to ring the bell or sound the whistle, but ran the engine against the plaintiff's father and killed him. The prayer of the petition was that the defendant be adjudged to forfeit and pay the sum of $10,000, and that plaintiff recover that sum and costs. The answer was a general denial and a plea of contributory negligence. At the trial, when the plaintiff was about to begin to

introduce her evidence, the defendant interposed an objection on the ground that the petition failed to state facts sufficient to constitute a cause of action, in that it was founded on the act of the General Assembly entitled "An act to amend section 2864 of chapter 17 of the Revised Statutes of the State of Missouri, 1899, entitled 'Damages and Contributions in Actions of Tort,'" approved April 13, 1905 (Sess. Acts 1905, p. 135 [Ann. St. 1906, p. 1637]), which act was unconstitutional because it was in contravention of section 30, art. 2, of the Constitution of Missouri (Ann. St. 1906, p. 166), and the fourteenth amendment of the Constitution of the United States. The objection was overruled and exception saved. The same point was also subsequently made in instructions asked by defendant, and refused, and also in the motion for a new trial.

1. As the question of the constitutionality of the act of 1905 reaches to the foundation of the case, we will consider it before going into the facts of the case. We do not understand appellant to challenge the validity of section 2864 (Ann. St. 1906, p. 1637) as it stood until amended by the act of 1905, but the challenge is to the section as amended. Section 2864, Rev. St. 1899, has been so long in our statutes that its terms are familiar to every one, and it need not be literally quoted here. In general terms it provided that when a person should die from an injury received through the negligence of an officer, agent, or servant engaged in running a locomotive, car, etc. (naming other transportation vehicles), the corporation or person owning the vehicle "shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars which may be sued for," etc. The act of 1905 made several amendments to that section, but the only one to which our attention is now called is in reference to the clause just quoted, which was amended to read as follows: "Shall forfeit and pay as a penalty for every such person, employee or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury, which may be sued for," etc. Of that amendment the learned counsel for defendant say: "In other words, this session law being highly penal, while the Legislature, as a police regulation, could fix any reasonable sum as the value of a man's life, or by way of punishment for the death of a human being, killed by negligence, this is peculiarly a legislative function, and the Legislature could not abrogate this function, or delegate the exercise thereof to a trial jury, without establishing some lawful basis for the jury's discretion." The words "as a penalty" inserted by the amendment add nothing to the meaning or effect of the section. We have always held it a penal statute, but the placing of a minimum and maximum limit to the amount of the penalty introduces an entirely new feature, and it is of that that appellant complains.

Appellant's contention is that the act of 1905, essaying to confer on the jury a discretion, within specified limits, of fixing the amount of the penalty, is in effect an attempt to deprive appellant of its property without due process of law, which is forbidden by section 30, art. 2, of the Constitution of Missouri, and also by the fourteenth amendment of the Constitution of the United States. The governmental function of declaring an act a crime, or other offense against the law, to which a penalty may be affixed can be exercised only by the legislative department; it cannot be delegated. To that extent the appellant is correct in its position and it is also correct to say that the prescribing of the punishment or penalty is a legislative function that cannot be delegated; for example, the General Assembly could not forbid the commission of a certain act, and say that one convicted thereof should be deemed guilty of a felony or misdemeanor and suffer such punishment as the jury might see fit to impose. But when the General Assembly has declared an act either a crime or negligence deserving a penalty, and has prescribed the punishment or penalty within limits, not less or more, it is not a delegation of legislative power to leave to the jury the fixing of the extent of the punishment or amount of the pecuniary penalty, within the prescribed limits, to be applied to the particular case. That has long been the course of criminal procedure in this state; and, even in states where it is not left to the jury, it is left to the court to fix the penalty within the prescribed limits. Indeed the Legislature could not, without inequality and injustice in most cases, prescribe a fixed penalty, because the circumstances under which a particular act is done usually distinguishes it in degree of offense from another similar act forbidden by the same statute.

It has been, from time immemorial in England, from whom we inherited the common law, and in this country, for the legislative department of the government to prescribe the punishment or penalty within limits, except in certain cases, and leave it to the courts to fix the extent in each case. In Ex parte Dusenberry, 97 Mo. 504, 11 S. W. 217, the petitioner was indicted for a crime for which it was prescribed that on conviction he "should suffer death, or be punished by imprisonment in the penitentiary not less than five years, in the discretion of the jury." It was there claimed that the law was unconstitutional because it delegated to the jury the discretionary power above indicated. But this court said that there was no doubt but that "the Legislature may lawfully vest in the triers of fact a power to determine the punishment within certain limits." If the General Assembly may lawfully leave it to the discretion of the jury in such case to deprive a man of his life or his liberty for such period as they may determine, without vio-

lating the "due process of law" clause of the Constitution, it does not violate that clause when, in a case of this kind, it leaves it to the discretion of the jury to assess the penalty at not less than $2,000 or more than $10,000. We have examined the cases referred to by the learned counsel for appellant in support of their contention, but we do not think they reach the point in question. In Louisville, etc., R. Co. *v.* Commonwealth, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, the Supreme Court of Kentucky held a statute of that state unconstitutional, but, as we understand the case, not on the ground that the statute left it to the jury to assess the amount of the fine "at not less than $500, nor more than $1,000," but because it left it to the discretion of the jury to say whether an act was criminal or not. The Kentucky statute declared that, if any railroad corporation should charge, collect, or receive more than "a just and reasonable rate of toll or compensation for the transportation of passengers or freight," or for the use of a car, it should be deemed "guilty of extortion." The point decided was that the statute did not say what rate of toll or compensation should be deemed "more than just and reasonable" to constitute the crime, but left that to the jury; it left the jury to say whether or not a certain act was a crime. The decision by a federal judge in Tennessee, also cited, is to the same effect. The New Jersey case, also cited by appellant, as we understand it, holds substantially as we have above held. Cigarmakers' Union *v.* Goldberg, 72 N. J. Law, 214, 61 Atl. 457, 70 L. R. A. 156, 111 Am. St. Rep. 662. The New Jersey court construed its statute to mean that the penalty between the minimum and the maximum limits was unconstitutional, because it "was to be determined by the party to be benefited thereby;" and, after so saying, it used this language: "The fixing of the precise legal penalty to be imposed must be essentially either a legislative function, in which only general considerations can have weight, or a judicial function, in which general considerations may be modified by special circumstances."

The learned counsel in their brief concede "that damage acts, which subject railroads to additional penalties over those which may be assessed against private individuals, may be upheld because of the peculiar hazardous nature of the business of railroading, rather than upon the mere occupation of railroading" (as indeed has been too frequently decided to admit now of a question), but they say that, "before such statutes can be upheld, they must be based upon the dangerous nature of railroading, or they will furnish an illegal classification." And they conclude their argument on this point by saying: "And where, as in this instance, the statute is susceptible of enforcement so as to subject different railroads to various and delinquent penalties for practically the same acts, it certainly violates

the constitutional provisions intended to protect all classes of citizens from such unequal and unjust discrimination." If there was never any difference in the circumstances attending the killing of different people by the negligent running of trains, etc., the Legislature might prescribe a fixed amount as the penalty in every case, as indeed was done in the statute in question before the amendment, but experience seems to have taught the lawmakers that different circumstances covered different cases; and, they saw fit to provide that the jury might, within limits, adjust the amount of the penalty to the circumstances of the particular case, the discrimination allowed is not against the particular defendant, but on account of the circumstances of the particular case. We hold that the act of April 13, 1909 (Sess. Acts 1905, pp. 135-137), is constitutional.

2. We come now to the case on its merits. The plaintiff's testimony tended to show as follows: Her father was a section hand in the employ of the Missouri Pacific Company. One of his duties was to walk over the track at certain times from Webb City to Carthage, to inspect the road. It was against the rules of the company, and contrary to his orders, for him to ride a velocipede over the road on his inspection route; but, on the morning of the accident, he had obtained a velocipede, and was riding over his route. He was going east towards Carthage, and the train which struck him was going in the same direction. The point of the accident was about 150 feet east of the east approach to the railroad bridge over Center creek, and near a water tank. Coming from Webb City the road (or the part we are concerned with) runs northeast until it reaches a point about 500 or 600 feet from Stout's creek, whence it curves east at an angle of 3° 56″ for a distance of 600 or 700 feet, from the east point of the curve to the water tank, and beyond the track is straight. From the east point of the curve to the water tank the distance is 836 feet. According to plaintiff's testimony the point where the deceased was struck was about 100 feet east of the water tank. There is a trestle west of the bridge, 333 feet long, which forms the bridge approach. The bridge is 150 feet long. It was downgrade from the east point of the curve to and beyond the place of the accident. The train was running 35 miles an hour. No witness for the plaintiff saw the accident. The one who came nearer seeing it than any other testified that he saw the deceased mount his velocipede and start down the road. He said: "I turned around and started off and looked again; he was on the speeder, crossing the trestle. At that time the train was coming; I heard it, at the Carterville crossing, whistle." The Carterville crossing, was a mile west. There was no other whistle sounded until the train got across the trestle. Afterwards the witness said that he heard the whistle for the Carterville crossing before the deceased got on the road. He

was asked if there was anything to prevent the engineer and fireman from seeing the deceased on the road, and he answered, "Nothing at all that I could see." Neither the question nor the answer indicated from what point on the road the train was when the deceased was in view; but the witness had just been speaking of the public road crossing, which by the diagram in evidence was 143 feet from the west end of the trestle, and 476 feet from the west end of the bridge. The witness, however, stated it was over a quarter of a mile to the water tank. We infer the witness referred to that crossing as the point from which the engineer and fireman could see the man on the track. Witness saw the man twice after he got on the track: First he was on the trestle, and the train was coming, the witness heard it; second "he was right at the end of the bridge" (which end not stated). "The engine ran in so close I couldn't well see him." "Did the engineer or trainmen put on the air or make any effort to stop that train? If they did, I couldn't hear it at all." Witness was 150 yards from the track when the train passed. When the man on the velocipede and the engine passed into the bridge witness lost sight of both, and did not see the collision. The whistle gave one long blast after it crossed the bridge. On cross-examination witness was asked if the engineer could see the man on the bridge until he got around the curve where the track was straight. He answered: "He couldn't see him until he got around the curve, but he could see through it all right." Asked by the court how far it was from the curve to the west end of the bridge witness said it was about half a quarter. "After he comes around this curve he ought to see him. He could see though about half a quarter." Witness gave it as his opinion that the engineer could have stopped on the trestle. He had never had any experience running an engine. Asked if he had ever seen a passenger train, equipped as this was, going 35 miles an hour downgrade, attempted to be stopped within that space, said he had not.

Another witness, a boy 14 years old, did not see the man before the collision, but saw him when he was thrown up in the air by the striking of him by the engine. His attention was drawn to the scene by hearing the whistle and the escaping steam, and in that instant he saw the man thrown up before the engine. He had heard no whistle before that. Another witness was on an electric car that passed near the scene. He testified that when he first saw the man on the speeder "he was near the overhead trestle work," and passing east. "He was going a reasonably slow rate of speed," and watching the track. The car witness was on soon made a turn which shut the man from view, "just then I noticed the engine approaching the east end of the main part of the bridge. The engine when I saw it was almost running into the overhead trestle work of the

bridge." The turn of the car obstructed further view, and the witness saw no more of it. He had heard no whistle up to that time. "Q. How long afterwards before you heard any at all? A. Well, seconds seemed like minutes right there. I can hardly tell how long; it was a very short duration, because the street railway car hadn't struck the end of the trestle work when I first heard the rumbling of the train in any manner or form." On cross-examination he said the man on the speeder was about the middle of the bridge when he first saw him, and was 20 or 30 feet of the bridge when the engine came on the west end of the bridge. Witness did not see the collision. One witness, who said he had experience as a railroad locomotive engineer 16 years, gave it as his opinion that this train, under the condition named, running 35 miles an hour downgrade, could have been stopped in a distance 200 feet.

Another witness, a boy 14 years old, testified that he was driving cows to pasture at a distance of half a mile east of the bridge. He heard the whistle, and ran to head off the cattle from crossing the track, and there he saw the engine coming. It ran a quarter of a mile east of the water tank before it stopped; then it backed.

A witness, who was a passenger on the train, testified that he heard no whistle or application of the air until they were on or near the bridge; then he heard or felt the air applied, and the stop was quite sudden. The train stopped with the rear coach opposite to the water tank.

The foregoing is the substance of the evidence on the part of the plaintiff tending to show that the engineer or fireman saw the deceased in time to have averted the accident by the exercise of ordinary care.

The engineer and fireman, witnesses for defendant, testified that they did not see the deceased until they had passed out of the curve and come into the straight track; then they both saw him. The engineer's testimony was: "As I came around the curve to the Center Creek bridge I seen the man crossing the bridge on the speeder. I reached for the whistle cord with one hand and the brake valve with the other. At the time the man got at the end of the bridge he got off the speeder and got down the dump clear off the right of way, and, as soon as he stopped himself he ran back up and caught hold of the speeder and pulled one end of the speeder on the ties, and remained in that position until I struck him. It was only a second or two from the time the man stopped himself as he jumped down the embankment until he got back to his speeder." He said he was about 150 yards distant from the man when he first saw him, about 300 feet from the west end of the trestle. As soon as he saw him he used all the appliances at hand to stop the train; the track at the point was downgrade about 1 per cent. In his opin-

ion the train, going as it was, could have been stopped in 600 or 700 feet, not less. The fireman's testimony was to the same effect.

At the close of the plaintiff's evidence, and again at the close of all the evidence, defendant asked an instruction to the effect that plaintiff was not entitled to recover, which was refused and exception saved.

In the above statement we have omitted a great deal of evidence tending to show that the plaintiff's father was himself guilty of negligence that contributed to the accident, and this we have done because that is a fact conceded; at least it is not contradicted. The plaintiff's petition states a cause of action based on the humanitarian doctrine alone, and the instructions under which the cause was submitted to the jury were on that theory. The petition states that the servants of the defendant in charge of the engine saw the plaintiff's father in his position of peril in time to have saved him if they had used ordinary care, but that they negligently, willfully, and wantonly failed to use the appliances at hand to do so.

This is not a case in which the defendant's servants were chargeable with the duty of being on the lookout for a person on the track, but it is a case where they had a right to a clear track, and no cause to suspect that the track would not be clear. Therefore it is not a case where it can be said that the defendant is liable if the engineer and fireman saw, or by the exercise of ordinary care could have seen, the position of danger in due time; but the defendant would be liable only if the men in charge of the engine actually saw the deceased in time to have averted the accident under the conditions and with the means at hand. We have quoted the defendant's evidence on this point, not for the purpose of weighing it against that of the plaintiff, but only to see how far, if at all, it aided the plaintiff's evidence in making out a case. The defendant's is the only direct evidence, however, to the effect that the engineer and fireman did see the deceased before the collision, but it is to the effect that, as soon as they saw him, they did everything in their power to save him, but it was too late. When they saw him they said they were about 150 yards distant, on a downgrade, going 35 miles an hour. One witness for the plaintiff testified that from the Lakeside crossing the engine could have been stopped on the trestle, which, according to the diagram, even counting to the extreme east end of the trestle, would be about 375 feet. But that testimony was not competent. The witness had never had anything to do with running an engine; had had no experience at all that rendered him qualified to give an opinion on that subject.

The other witness who testified that the train in question, under the conditions named, could be stopped within 200 feet was a man whose experience qualified him to express an opinion

on that subject. Therefore his was competent testimony. Whilst evidence of that kind is in the nature of what we call "opinion evidence," yet it is something more than a mere opinion. When a man has by long experience in running and stopping trains observed the distance in which he has often under similar conditions stopped them, he knows as a fact in what distance it can ordinarily be stopped; conditions of course may vary, causing the stop to be more or less short or long of the space expected, and to that extent such testimony is a matter of opinion. This train was going 35 miles an hour on a downgrade of 1 per cent. If it could be stopped in 200 feet, the stop would be in less than four seconds of time. A jury cannot take judicial cognizance of the space within which a train under these circumstances could have been stopped, yet in weighing the opinion evidence they are bound to exercise their own common sense. They were not bound to believe it because the witness had so testified; and, if the jury in this instance had discarded the opinion of this witness as unreasonable, they would have been in the lawful exercise of their prerogative in so doing. That was all the competent expert evidence, however, on the part of the plaintiff tending to show that the train could have been stopped sooner than it was. The testimony on the part of the defendant, however, tends to show that the train could have stopped within 600 or 700 feet, and that looks reasonable.

Now let us see within what distance it was stopped. From the point of the curve nearest to the bridge to the water tank was 846 feet; the evidence conflicts as to how far the train ran beyond the water tank before it stopped; plaintiff's evidence tends to show that the point of collision was about 100 feet east of the water tank; the engineer said it was not over 20 or 25 feet, and that when the train stopped the rear coach was just opposite the point where the deceased lay; one of plaintiff's witnesses makes that statement also, but another one said it ran a quarter of a mile beyond the tank and backed to the place of the accident. The train was estimated to be 120 or 200 feet long; there were two passenger coaches, a baggage car, the tender, and the engine. Taking the engineer's estimate, the engine ran at least 150 feet beyond the water tank. That would make the whole distance the engine ran from the point of the curve until it stopped 996 feet. Taking the plaintiff's witness, who estimated that the train ran a quarter of a mile beyond the tank and backed to the scene of the accident, even if we discount his estimate 50 per cent. or more, the train ran considerably over 1,000 feet from the point where the man came into view before it stopped. The testimony of the passenger who said the air was not applied until the train was on the bridge, and that the stop was quite sudden, is also to be considered.

The engineer testified that he realized the man's danger as

soon as he saw him, but we need no testimony to prove that a man on a bridge in front of a fast-coming train is in peril. It is true, as insisted by appellant, that the testimony of the engineer and fireman, to the effect that the man had gotten off the velocipede and down the embankment, where he was safe, and ran back again in face of the engine, then very near him, is uncontradicted, but the court could not assume that that testimony was true. If the fact was as so testified, it was a complete defense to the cause of action stated in the petition, but whether it was so or not was a question for the jury, and it was given to them to say. Under this condition of the evidence the court could not have done otherwise than submit the case to the jury.

3. The first instruction given at the request of the plaintiff was as follows: "The court instructs the jury that, if you believe from the evidence in this case that Pansy Middleton was at the time of her father's death the only minor child of Lewis Middleton, deceased; that no wife survived him; that on February 11, 1905, the Missouri Pacific Railway Company owned the line of railway between Carthage and Joplin mentioned in evidence, and that the plaintiff's father was at that time in the employ of said railway company as section hand, and as such was, at the time of the accident complained of, engaged in inspecting the tracks on that part of said railroad where the accident occurred, going east over said track on a railroad velocipede commonly called a 'speeder,' and that about 8 o'clock in the forenoon of that day, while plaintiff's father was engaged in the line of his duty inspecting said track on said speeder, a passenger train, composed of a locomotive and train of cars operated by the St. Louis, Iron Mountain & Southern Railway Company, over and upon the tracks of the Missouri Pacific Railway Company, approached said Middleton from the west, and that at the point of the accident the track was straight, with nothing intervening to obstruct the view of the trainmen for some distance, and that said Middleton became in great danger of being run over and killed by said train, that both the said engineer and fireman saw him from the time the train was about 1,200 feet away until he was struck and killed, and knew that he was unaware of the near and dangerous approach of said train, and that the engineer became aware of Middleton's perilous position on said track in time to have enabled him, with the exercise of ordinary care, to have prevented the accident and avoided running the locomotive against him, by stopping or placing the train under control, or sounding the usual danger signals, and that said engineer failed to use the appliances at hand to stop or place said train under control, or to sound said danger signal, but ran the locomotive against said Middleton and killed him, and if you further believe from the evidence that the St.

Louis, Iron Mountain & Southern Railway Company was authorized or permitted by the Missouri Pacific Railway Company to operate the train in question upon the tracks of the latter company at a point where the accident occurred, then the plaintiff is entitled to a verdict at your hands against the St. Louis, Iron Mountain & Southern Railway Company."

That instruction assumes, or at least authorizes the jury to find, that the plaintiff's father at the time of the accident was on the track in the due performance of his duty, from which an inference might improperly be drawn that he was where his duty then called him, where he had a right to be, and therefore was not negligent. If that was not the inference intended to be drawn, then the fact was wholly irrelevant. It was immaterial, under the theory on which the case was submitted to the jury, whether he was there in the line of his duty or as a trespasser. The defendant would have owed a mere trespasser, under the evidence in this case, the same duty that it owned this man; that is, not to injure him after the engineer saw him and realized his danger if by the exercise of ordinary care it could avoid doing so. If that part of this instruction was intended or was liable to authorize the jury to find that the plaintiff's father was not guilty of negligence in inspecting the track under the circumstances shown in the evidence, then it was error, because there was no evidence that authorized such a conclusion; the evidence showed he was negligent. There was evidence tending to show that he was a section hand, and that it was his duty at times to inspect the track, and a witness for the plaintiff testified that at the time of the accident he seemed to be inspecting the track; but the plaintiff's evidence also showed that he knew this train was coming. It was a regular passenger train on its schedule time. He stood by the track, according to plaintiff's chief witness, apparently listening for the train. The witness heard it, and the deceased must have heard it. Then the deceased put the speeder on the track and started down the road as if to beat the train across the bridge. The evidence was that he was forbidden to ride on a velocipede in going over his inspection route, and to that extent he was on this occasion violating his orders. Perhaps, if he had not provided himself with the velocipede, he would not have undertaken to speed down the road in front of a train that he knew was coming, but we do not attach any importance to that fact. It only is an item going to prove an immaterial fact, that is, that the deceased was guilty of contributory negligence. His duty did not call him to go on a long trestle and bridge so close to a coming train as to endanger his life. Therefore the mere fact that he was there inspecting the road did not authorize the jury to find that he was there in the line of his duty. It makes no difference, under the only theory on which the plaintiff's cause

of action rests, whether the deceased was, at the time, in the line of his duty or was a trespasser; but the instruction authorizing the jury to take into consideration the fact that he was there in the due discharge of his duty throws into the scales weighing the evidence an item that should not be considered, a fact that tends to enlist the sympathy of the jury and prejudice the defendants. The jury was authorized by that instruction to find that the deceased was wholly in the right and the defendant wholly in the wrong. Perhaps, if that were the only error in the instruction, it might be passed over on the idea that it was harmless, because it authorized a finding of an immaterial fact; but it was not the only error.

There is another hypothesis in the instruction that should not have been submitted. It authorizes the jury to find that the engineer and fireman, not only saw the peril, but also knew that the deceased was unaware of the near approach of the train, and failed to sound the whistle to warn him. There was no evidence that the engineer or fireman knew that the deceased was unaware of the near approach of the train, or that the sounding of the whistle would have done any good. When a man is seen heedlessly walking along a well-beaten footpath inside the track, in front of an approaching train, when it is apparent that he could easily step aside and be out of danger, the situation suggests that probably he is unaware of his peril. Under those circumstances the duty should devolve on the engineer to sound the whistle to give him warning. But in this case the man was on the bridge when they first saw him; it was impossible for him to escape except to beat the train across, where he could jump to the ground. This instruction authorizes a verdict for the plaintiff for the failure of the engineer to sound the whistle; that is, it authorizes a verdict for the plaintiff if the engineer either failed to use ordinary care to stop the engine or to sound the danger signal. We cannot know from this verdict whether the jury found for the plaintiff on the ground that the engineer failed to stop as soon as he could or that they based the verdict on the fact that he failed to sound the whistle. There is nothing in the evidence in this case to indicate that the sounding of the whistle would have done any good. In fact the plaintiff's expert witness, the railroad locomotive engineer of 16 years' experience, said that in such an emergency he would not apply the whistle. He said: "What's the use going to whistle? You better try to stop without bothering the whistle." In that respect this case is unlike Heinzeman *v.* Railroad, 182 Mo. 611, 81 S. W. 1134, or Reyburn *v.* Railroad, 187 Mo. 565, 86 S. W. 174, or Eppstein *v.* Railroad, 197 Mo. 720, 94 S. W. 967. In either of those cases it seemed that if the engineer had sounded the whistle, the life would have been saved. But nothing so appears in this case, and it was error to instruct the jury

that they could find for the plaintiff if they should find that the whistle was not sounded. Nothing would have saved the life of this man, so far as we can judge from the evidence, except the stopping of the train. It was error to have given that instruction. The same error as to the sounding of the whistle runs through the second instruction.

4. At the request of the defendant, the court have 5 instructions, and refused 16 others. We do not deem it necessary to discuss each one of those 16 refused instructions; it is sufficient to say that all that was good in them was contained in the 5 given, and what was not so contained was not the law. Therefore the instructions were properly refused. Some of the refused instructions related to the measure of damages, and were in that respect predicated on the proposition that the session act of 1905, amending section 2864, was unconstitutional. Others required the jury to find that, unless the conduct of the engineer and fireman was "wanton, willful, and reckless," the verdict should be for the defendant. We do not recognize degrees of negligence; and, whilst the terms "wanton, willful, and reckless" are sometimes used in characterizing conduct, yet, after all is said, the law applies only the word "negligent." Negligence is a failure to perform a duty. The law recognizes degrees in care, very high care, and ordinary care, but the failure to exercise the highest degree of care required is only negligence, whilst failure to exercise ordinary care is also negligence, neither more nor less. Liability attaches from the failure to exercise the care required by the law—negligence—but when the liability is established, the character of the defendant's conduct, whether merely inattentive, or willful, wanton, or reckless, is a fact that may be sometimes considered in assessing the damages. If it be a case in which the damages as for compensation to the person injured be in question, the jury after assessing compensatory damages may, in a proper case, look into the character of defendant's conduct to see if punitive damages should also be awarded. In the case at bar, however, the damages are not given as compensation to the party aggrieved, but as a penalty which the law prescribes for the negligent killing of a human being; it is all penal in its character, and in fixing the penalty the jury have a right to consider the conduct of the negligent party beyond the mere finding that he was negligent. They may consider whether the conduct which resulted in the catastrophe arose from mere inattention, or was willful, wanton, or reckless. That is what the jury does in assessing the punishment for a crime, and it is what the amendment of 1905 to section 2864 authorizes the jury to do in assessing the amount of the penalty under that section of the statute.

For the errors in the plaintiff's instructions above pointed out, the judgment is reversed, and the cause remanded to the circuit court to be proceeded with according to law. All concur.

CLEVELAND, C., C. & ST. L. RY. *v.* FOLAND.

(Supreme Court of Indiana, April 20, 1910.)

[91 N. E. Rep. 594.]

Master nad Servant—Employer's Liability Act—Application.—A railroad employee injured while serving as a member of a bridge gang from the falling of bridge piles has no cause of action under the employer's liability act (Burns' Ann. St. 1908, § 8017), since the basis on which the constitutionality of the statute is granted is the hazards attending the operation of trains alone.

Master and Servant—Vice Principal.—The rank given a servant is not controlling on whether he is a vice principal under the common law, since this must be determined from the character of the duties conferred on him.

Master and Servant—"Vice Principal"—Who Are.*—The term "vice principal" is generally used to denote an employee to whom the employer has intrusted the performance of a duty which the law requires the employer himself to assume.

Master and Servant—Injuries to Servant—Cause of Action.—To constitute a cause of action by an injured servant against his master, there must be a duty shown as owing by the master, and its neglect by him or by one acting in his stead or by a vice principal, and consequent injury.

Master and Servant—Vice Principal—Common Law—Duty to Master.†—A foreman of a bridge gang ordering members of the gang to unfasten pilings which had been nearly sawed off by a co-employee, whereby the latter was injured by a falling pile, is not a vice principal at common law, since there was no neglect of the master of any duty intrusted to the foreman.

Appeal from Circuit Court, Delaware County; Jos. G. Leffler, Judge.

Action by William H. Foland against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the Appellate Court (88 N. E. 787) affirming a judgment for plaintiff, defendant appeals. Reversed, with instructions.

A. B. Everhead, C. E. Cowgill, L. J. Hackney and *Frank L. Littleton*, for appellant.

Bagot & Bagot, for appellee.

*See last paragraph of first foot-note of Chicago, etc., Co. *v.* Barker (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228; first foot-note of Chicago, etc., Ry. Co. *v.* Rathneau (Ill.), 26 R. R. R. 202, 49 Am. & Eng. R. Cas., N. S., 202.

†See last foot-note of Silvia *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74; Konoski *v.* Delaware, etc., R. Co. (N. J.), 34 R. R. R. 78, 57 Am. & Eng. R. Cas., N. S., 78.

MYERS, J. This was an action by appellee against appellant for alleged negligence.

The material portions of the complaint, which is in one paragraph, are: "That appellee was an employee and servant of appellant, as a laborer engaged in the work of bridge building, and with other employees of appellant was engaged in preparing the foundation for abutments for a bridge. That the plaintiff and the other employees with whom he was so engaged constituted a force of men called a 'bridge gang,' and the defendant appointed and constituted one William Litton superintendent, foreman, and boss over said gang, and gave and delegated to him power and authority to provide the ways, works, tools, machinery, and appliances with which to do and perform said work, and to direct the manner and means of doing the same, and to order and direct and control the service and work of each and all of said gang, including this plaintiff, and to order, direct, and command each of said employees, including this plaintiff, as to what particular service they, and each of them, were to perform, and the particular place they and each of them should occupy in performing said work, and it was the duty of each of said employees, including this plaintiff, and they were each bound so to do, to conform to and obey each and every order of said Litton in and pertaining to all matters connected with said work and the performance thereof. That on said 3d day of January 1905, there were at said place a great number of piles, each consisting of a heavy piece of timber about 40 feet in length and 8 to 12 inches in diameter, which had been previously driven into the ground about half the length, leaving about 20 feet in length of the upper end of each projecting above the level and surface of the earth. That, prior to said date, there had been prepared an excavation or pit in which piling was to be driven, and that said piling which had been so previously driven as aforesaid had been braced and fastened together at the top by spiking a heavy board across the tops thereof, and from one to another, so that they were firmly stayed, supported, and held in place and kept from falling. That on said day said piles were so braced and stayed as aforesaid and secured so that none of them could fall, and, while they were in said condition, the said Litton ordered and directed this plaintiff to go into said pit or excavation and act as pile steerer, and then and there ordered and required others of said employees to operate a crane derrick and others to operate a pile driver, and others to saw off at the ground level said piles so partially driven, and then and there ordered and directed said employees in charge of said crane derrick to lash a chain and rope around the tops of said piles, one by one, and, after the same were so sawed off by said other employees, to raise them one by one by means of said derrick and swing them in turns over said pit or excavation,

and it then became, and was, the duty of this plaintiff under his said employment and the order of said Litton to seize the lower end of each pile, and steer it to its proper place to be driven, and, when so steered and placed, the same to be lowered by the said derrick, and then driven by said employees in charge of said pile driver. That the place where the plaintiff was so required to do and perform his duty as aforesaid was so located that, if said pile so partially driven should fall, they would fall against and upon him; that plaintiff and all said employees obeyed said Litton, and that while the plaintiff and said other employees were so engaged as aforesaid the said Litton ordered, directed, and required said employees so engaged in sawing off said piles to saw all of them without waiting for the derrick men, which said men so engaged in sawing at once did, leaving only a small part of each pile unsawed, and not leaving sufficient amount to support the weight of said piles or prevent them from falling without the support of said stays at the top. That, after said piles were so sawed and the plaintiff was so engaged in said duty at the point where he was so ordered and required to be, the said Litton ordered and required others of said employees, without the knowledge or consent of the plaintiff, to go above and to the tops of said piles and with crowbars pry loose said brace and stay, which they did, all without the knowledge or consent of the plaintiff, and without any notice to him whatever. That, as soon as said brace and stay was loose as aforesaid, one of said pilings of great weight fell upon and against the plaintiff while he was at the point where he was so directed and required to be, whereby his left leg was crushed and broken in such a manner so that it became necessary to amputate the same."

Then follows description of his injuries and his loss and damage: "That he received his said injury on account and by reason of the carelessness and negligence of said Litton in ordering and requiring the plaintiff to work in said place as aforesaid, and allowing and permitting said defect in the conditions of said ways and works connected with and in use in said business of the defendant, in causing and requiring said brace to be released and removed therefrom, and causing and permitting said piling to fall, all of which was removed by same all without notice to the plaintiff. That each and all of said acts and orders and directions done and given by said Litton were done and given as such foreman and superintendent for and on behalf of this defendant. That the plaintiff had no notice or knowledge whatever that said brace had been so released or removed or of the danger occasioned thereby until said piles fell and injured him."

If the theory of this complaint is that of liability under the employer's liability act (Burns' Ann. St. 1908, § 8017), no cause

of action is stated, for the reason that it appears that appellee was not engaged in the train service, and the rule is settled in this state that the reason for the statute and the basis upon which its constitutionality is grounded is that of the hazards attending the operation of trains. Indianapolis, etc., Co. *v.* Kinney (1908) 171 Ind. 612, 85 N. E. 954, and cases cited. Appellee's employment and service was in no wise different from that of an employee in the construction of a bridge by any private person or corporation or by any public authority. The complaint clearly cannot be sustained under the employer's liability act. It seems to have been based and tried upon that theory; but, lest we might be mistaken in that view, we are led to inquire into the sufficiency of the complaint as a common-law right of action, and are at once confronted with the proposition as to whether the superintendent, foreman, and boss was a vice principal or a fellow servant. The allegation that he was delegated with "power and authority to provide the ways, works, tools, machinery, and appliances with which to do and perform the work" is not controlling, for the reason that there is no defect alleged in any of these particulars. If there has been, then the duty of providing safe ways, works, tools, etc., being a duty owing by the master, the delegation of the power and authority to provide them would constitute the foreman a vice principal. American, etc., Co. *v.* Hullinger, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, and cases cited; Dill *v.* Marmon (1905) 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; Ft. Wayne Co. *v.* Parsell (1906) 168 Ind. 223, 79 N. E. 439. His designation as superintendent has in itself no necessary meaning as constituting him a vice principal; that must be determined from the character of the duties conferred upon him, and not by his rank. Thacker *v.* Chicago, etc., Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792, and cases cited. Whether one is a vice principal or a fellow servant is not always readily determinable. In Elliott on Railroads, § 1317, it is said: "The term 'vice principal' is generally used to denote an employee to whom the employer has intrusted the performance of a duty which the law requires the employer himself to perform. We think that a superior agent or vice principal is an employee who is intrusted generally with the performance of the master's duties, or is intrusted with the performance of some of the master's duties, although he may not be intrusted with all the duties of the employer. We believe that, where the duty which the law imposes on the employer is intrusted to an employee, the employee is a vice principal as to that duty, although the matter to which it relates may not in the strict sense be a general one." This definition seems to us to be sound and in accord with our own cases.

It was said in Thacker *v.* Chicago, etc., Co., *supra:* "A vice

principal, therefore, is one who represents the master in the discharge of those duties which the master owes to his servant. If, however, the servant whose negligence caused the injury was not at the time discharging a duty which the master owed to his servants, but simply a duty which the servant owed to the master, he was a fellow servant with others engaged in a common business, and the master would not be liable for any injury inflicted upon such fellow servants by reason of his negligence." See, also, Dill *v.* Marmon (1905) 164 Ind. 507, 521, 73 N. E. 67, 69 L. R. A. 163, and cases there cited. In Justice *v.* Pennsylvania Co., 130 Ind. 321, 30 N. E. 303, it was held that a section foreman with authority to hire and discharge men was a vice principal as to that duty, but a fellow servant of those working with him. Alaska Mining Co. *v.* Whelan (1897) 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. The negligence here charged is that of the foreman in directing the work in which by reason of lack of care in its performance appellee was injured, neglect of the duty the foreman owed the master, and of the duty he owed his colaborer not to injure him. To constitute a cause of action, there must be a duty shown as owing by the master, and its neglect by him, or by one acting in his stead, or as vice principal, and consequent injury. Cleveland, etc., Co. *v.* Morrey (1909) 172 Ind. 513, 88 N. E. 932, and cases there cited. The complaint shows appellee engaged in a general employment attended with more or less danger under any circumstances, and no duty is alleged as owing to him by the master which is shown to have been neglected by the master. The most that is shown is that one who is not shown to be a vice principal, but at the most a superior fellow servant, by the manner of directing the work caused the injury to appellee. We see no escape from the proposition that the complaint is not good as a common-law right of action.

For the insufficiency of the complaint, the judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

DELAWARE, L. & W. R. CO. *v.* ROYCE.

(Circuit Court of Appeals, Second Circuit, February 8, 1910.)

[176 Fed. Rep. 331.]

Master and Servant—Master's Liability for Injury to Servant—Duty with Respect to Machinery.*—The master does not insure the servants against defects in or breakdown of his machinery or appliances, but all that the law imposes on him is the duty to exercise reasonable care to make and maintain them safe.

Master and Servant—Master's Liability for Injury to Servant—Negligence of Fellow Servant.†—A guide for one of the crossheads on a locomotive drawing a train was lost, and as the train lay on a siding the conductor reported the loss to the train dispatcher and procured another engine to help the train in, but did not report it to the superintendent, as required by the rules of the company. The engineer negligently failed to disconnect the disabled side of the engine while it was being moved, and the driving rod became disconnected, with the result that plaintiff, who was a brakeman stationed in that side of the cab, was injured. Prior to the loss of the guide, the engine was in good repair. Held, that defendant railroad company was not chargeable with notice of the dangerous condition of the engine, but that the negligence which caused plaintiff's injury was that of the engineer or conductor, who were his fellow servants, for which defendant was not responsible.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Joseph M. Royce against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. W. Thomson, for plaintiff in error.

Hatch & Clute (*Edward S. Hatch* and *Vincent P. Donihee,* of counsel), for defendant in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

*See last foot-note of Hill *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 672, 57 Am. & Eng. R. Cas., N. S. 672; foot-notes of St. Louis S. W. Ry. Co. *v.* Lewis (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

†For the authorities in this series on the question whether the superior employee of their common master was acting as a fellow servant or vice principal at the time an employee under his orders was injured through his negligence, see second foot-note of Lapre *v.* Woronoco St. Ry. Co. (Mass.), 28 R. R. R. 210, 51 Am. & Eng. R. Cas., N. S., 210, where all those preceding it are collected; Konoski *v.* Delaware, etc., R. Co. (N. J.), 34 R. R. R. 78, 57 Am. & Eng. R. Cas., N. S., 78; Silvia *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

WARD, Circuit Judge. March 1, 1907, plaintiff was brakeman on a coal train of the defendant en route from Scranton, Pa., to Hoboken, N. J., which according to schedule ran into a siding near Waterloo Station, N. J. It was there discovered that the upper guide on the left side of the engine had dropped off. The piston which is driven forward and back by the cylinder or steam chest is attached at its outer end to one side of a block of steel called a "crosshead," to the other side of which the driving rod of the driving wheel is attached. The crosshead moves forward and back between two parallel horizontal guides; the upper one being lost on this occasion. Thereupon the conductor, after consultation with the engineer, called up the office of the chief train dispatcher at Hoboken, and delivered the following message over the telephone.

"Engine 866 is at Waterloo Siding, and we have lost our top guide; if you send us a pusher we can bring our train in all right."

The engine was of the type known as "Mother Hubbard;" the cab being right over the boiler and fastened to it, leaving a place for the engineer to stand on the right side and for a brakeman on the left. A pusher was promptly sent, and the train proceeded with the intention of leaving the engine for repairs at the Port Morris yard; but in entering the yard the driving rod became disconnected, struck the floor of the cab. and loosened one of the bolts which held it to the boiler, from which steam escaped, seriously injuring the plaintiff, who was on the left side of the cab.

The only error assigned that need be considered is the refusal of the trial judge to direct a verdict for the defendant. He did so on the ground that the engineer upon the happening of the first accident to the engine became the alter ego of the defendant. and he left it to the jury to determine whether the engineer did what he ought not to have done, or left undone what he ought to have done, in respect to the disabled engine.

The following rules of the company were offered in evidence:

461. "All irregularities such as derailment, breaking of cars. defect in cars or engines; defective condition of bridges or track: failure in water supply, and unusual detention of trains must be promptly reported by conductors to the superintendent."

360. "Chief train dispatchers will report to the superintendent. In matters relating to the management of telegraph lines they will also report to the superintendent of telegraph."

361. "They are in charge of the movement of trains; of the local distribution of cars and of the operation of telegraph lines on their respective divisions. They are also in charge of the train dispatchers, telegraph operators and linemen. * * *"

366. "They must keep constantly and closely informed as to the location and progress of all trains, require prompt reports

of their departure, and, when necessary, of their arrival, from all open telegraph offices, and see that all such reports are entered upon the train sheet. Causes of delay must be immediately ascertained, and, if possible, remedied."

The master does not insure the servants against defects in or breakdown of his machinery and appliances. All the law imposes on him is the duty to exercise reasonable care to make and maintain them safe. When it is said that the master cannot delegate this duty, no more is meant than that this reasonable degree of care must be exercised either by himself or by those who stand in his place. No antecedent negligence was alleged as to the engine. Indeed, the proofs established that it was originally fit, was kept in repair, and regularly inspected. Therefore, if the defendant failed of its duty to the plaintiff, it did so at the time the loss of the upper guide was discovered. The jury having found that the engine was unfit, and that it was negligence to proceed with it, the question arises whether this negligence was that of the defendant as master or of the plaintiff's fellow servants. The conductor and engineer were, as such, certainly his fellow servants. Baltimore & Ohio R. R. Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; New England R. R. *v.* Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. Notice to them was not notice to the defendant as master. The defendant had prescribed reasonable rules applying to the situation. The conductor, as the head of the crew, was required to communicate to the superintendent, who was the alter ego of the defendant; but he neglected to do so. He reported to the chief train dispatcher, another alter ego, but only in respect to the location and movement of the train. It is, therefore, plain that the defendant as master had no notice that the engine, originally fit, kept in good order, and regularly inspected, had broken down. Although the report to the chief train dispatcher stated that the upper guide had been lost, this was done merely to explain the delay. Even if the train dispatcher knew or thought the defect was one likely to make it dangerous to proceed with the engine in that condition, he had a right to suppose that the engineer had disconnected the disabled side, as the proofs show he could perfectly well have done. The purpose of the message was to get from the train dispatcher the remedy which the conductor applied to the situation, namely, the pusher, and this was promptly supplied.

The record disclosing no evidence of negligence on the part of the defendant as master, the judgment is reversed.

ILLINOIS CENT. R. CO. *v.* HART.

(Circuit Court of Appeals, Sixth Circuit, February 8, 1910.)

[176 Fed. Rep. 245.]

Courts—Federal Courts—Authority of State Decisions—Questions of General Law.—In the absence of a state statute governing the subject, the question of the liability of an employer for an injury to an employee is one of general law, as to which the federal courts are not bound by the decisions of the state courts.

Master and Servant—Master's Liability for Injury to Servant—Negligence of Fellow Servant.*—It is the settled rule in the federal courts that an employer is not liable for an injury to an employee occasioned by the negligence of another employee engaged in the same general undertaking, and it is not necessary to the application of this rule that an employee should be engaged in the same operation or particular work; but it is sufficient if the two are in the employment of the same master and engaged in the same common enterprise, both performing duties tending to accomplish the same general purpose, although they may be in different departments.

Master and Servant—Master's Liability for Injury to Servant—Custom of Doing Work.—In order that a custom of railroad employees to do work in particular manner should be binding on the company, and render it liable for an injury resulting to another employee, the custom must have been known to it, or have been so general that its knowledge must be presumed.

Master and Servant—Duty of Railroad Company—Operation of Road.†—While a railroad company owes a positive and nondelegable duty to its employees with respect to the construction and maintenance in proper repair of its cars, tracks, and other appliances, yet with respect to the operation of its road its duty extends no further than to exercise ordinary care to provide a sufficient number of reasonably competent employees, make proper rules for their government, and exercise proper supervision over them, and when that has been done it is not liable for an injury to an employee in the operation of the road through the negligence of other employees in the operating department or their failure to observe the rules, notwithstanding such negligence makes the place unsafe to work in.

*For the authorities in this series on the subject of the different department limitation of the fellow servant rule, see last foot-note of Konoski *v.* Delaware, etc., R. Co. (N. J.), 34 R. R. R. 78, 57 Am. & Eng. R. Cas., N. S., 78.

†For the authorities in this series on the question whether a railroad company is responsible for injuries to servants resulting from violations of rules made for the protection of employees, see last foot-note of Moyer *v.* Ann Arbor R. Co. (Mich.), 34 R. R. R. 669, 57 Am. & Eng. R. Cas., N. S., 669; Dixon *v.* Grand Trunk W. Ry Co. (Mich.), 33 R. R. R. 371, 56 Am. & Eng. R. Cas., N. S., 371.

Illinois Cent. R. Co. *v.* Hart

Master and Servant—Master's Liability for Injury to Servant—Fellow Servants—Railroad Employees.‡—Plaintiff was employed by defendant railroad company as signalman; his duty being to keep the boxes and appliances used in connection with its block signal system in good condition and repair. While working at such employment, at a place on the outside of one of the tracks of defendant's double-track road, the baggageman on a rapidly moving train on the opposite track kicked a block of ice from the car, and its momentum caused it to slide across the tracks and strike and injure plaintiff. The ice was furnished by defendant for the use of a section crew, and was put on the car by a station agent, who directed that it be kicked off at the crossing, as it was. Held, that plaintiff and the baggageman were fellow servants, and that, in the absence of evidence that the station agent had authority from defendant to give the directions he did, or of a custom to so deliver the ice from the moving car so general as to be presumed to have been known to defendant, it was not liable for the injury.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action by Robert Lee Hart against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error (plaintiff below, and hereafter called the plaintiff) recovered verdict and judgment against the plaintiff in error, as defendant below, on account of personal injuries suffered by the plaintiff. The case was heard upon the following statement of facts, agreed upon between counsel at the trial:

"On the 17th of September, 1907, Robert Lee Hart, the plaintiff, was employed by the Illinois Central Railroad Company as a signalman. His duties were to keep the boxes and appliances used with the electric signal service of the company in repair, and he was at that time assigned to a certain section of the railroad. At the place where he was assigned, the block signal service was in operation on the line of the defendant, Illinois Central Railroad Company, and its railroad at that place consisted of a double track, one track for the use of its north-bound trains, and one track for the use of its south-bound trains. The trains operated by the defendant, Illinois Central Railroad Company, were operated by means of electric block signals. These signals are in the form of a high pole with a semaphore, and work automatically by means of electric batteries and wires; the semaphore being connected with the rails

‡See second foot-note of Neagle *v* Syracuse, etc., R. Co. (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; third foot-note of Chicago, etc., Ry. Co. *v.* Barker (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228.

of the track, so that a train, in passing over the rails by one of the signals will cause the same to work automatically, and to display a signal which will indicate to any other train approaching on the same track that the block, which is the portion of the track between signals, is occupied by another train, and under the rules of the company, no train is permitted to enter a block which is so occupied. When the train passes out of the block, the signal is automatically displayed so as to indicate that the block is empty and not occupied by a train; and all of the trains upon the road are operated in this manner, and proceed in accordance with the signals from the semaphores of the various blocks. On the above date, to wit, September 17, 1907, Hart was engaged in the discharge of his duties as a signalman, and in the act of repairing one of the batteries in connection with the block signal service, near the town of East Cairo, and so engaged on the west side of the west or south-bound track, when a passenger train of the defendant company approached, running on the east track, at the rate of some 50 or 60 miles an hour, and just before the train reached the place where Hart was at work, and at the crossing of a road, the baggage master of the train threw or kicked from the baggage car, a bag of ice, weighing about 100 pounds, and which bag, owing to the momentum of the train, when it struck the ground, skidded across the south-bound track, and out more than 20 feet from the north-bound track, to the place where Hart was standing, and struck and broke his leg, and otherwise injured him. The bag of ice was put upon the train south of East Cairo, for the purpose of being thrown or kicked off at this place. It was company ice; that is, ice which the railroad company furnished to its section men in warm weather, and was thrown off at this place for the use of those employees. That this was done without the knowledge of this man, and that he, at the time, was a stranger on that part of the work, had simply been put there a few days in interchange with another employee of the company, who had been sick at that time; that his bag of ice was directed by the depot agent at the town of Wickliffe to be so kicked off of that fast running train, and when it was placed upon the train by the agent, or by his orders, it was known that the train would not stop at that place, and it was indicated that it should be kicked off from the train when running at this high rate of speed."

It was agreed that, if the defendant should be held liable, the amount of the verdict for plaintiff should be $3,500. At the conclusion of the statement (no other evidence being introduced) the defendant moved for the direction of a verdict in its favor, upon the ground that the men engaged in the operation of the train, including the baggage master, were fellow servants of the plaintiff. This motion was overruled, and the jury instructed to return a verdict in favor of the plaintiff, for $3,500. The writ

of error brings up for review the action of the court, not only in refusing to direct a verdict for the defendant, but also in directing a verdict for the plaintiff.

C. N. Burch, for plaintiff in error.
K. D. McKellar, for defendant in error.

Before SEVERENS and WARRINGTON, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). It is contended on plaintiff's behalf that the court rightly directed a verdict for the plaintiff, upon the ground, first, that the baggageman, in so throwing or kicking the ice off the train, was acting, not in the performance of his duties as baggageman, but "merely doing what the master himself had planned and directed him to do," it being shown, as insisted, that it was the custom of the railroad company to have this ice so distributed by putting the same off rapidly moving trains, and that the act in question was thus "in accordance with a fixed purpose and plan"; and, second, because the act of so throwing off the ice was a breach of the employer's duty to provide the employee with a safe place to work.

It is clear that unless this method of putting the ice off the moving train is shown to have been either expressly or impliedly authorized by the railroad company, or permitted by it, with knowledge of the existence of the alleged custom (or unless it shall be held that the act in question constituted a breach of the employer's duty to provide plaintiff a safe place to work), the act of the baggageman was the act of a fellow servant of the plaintiff. There being no Tennessee statute governing the relations in question, it is unnecessary to look to the decisions of the Supreme Court of that state; the question being one of common-law liability of the employer, and thus one of general law. B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Newport News & M. V. Co. *v.* Howe (C. C. A., 6th Circuit) 52 Fed. 362, 3 C. C. A. 121; Kinnear Mfg. Co. *v.* Carlisle (C. C. A., 6th Circuit) 152 Fed. 933, 936, 82 C. C. A. 81.

The rule is well settled in the courts of the United States that an employer is not liable for an injury to an employee occasioned by the negligence of another employee engaged in the same general undertaking; that it is not necessary to the application of this rule that an employee should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master and engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purpose; or, in other words, if the

services of each in his particular sphere or department are directed to the accomplishment of the same general end. Among the cases which declare this rule the following decisions of the Supreme Court and of this court may be cited: B. & O. R. R. Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Oakes *v.* Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; No. Pacific R. R. Co. *v.* Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; New England R. R. Co. *v.* Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; Grady *v.* Southern Ry. Co., 92 Fed. 491, 494, 34 C. C. A. 494; Thomas *v.* C. N. O. & T. P. R. Co. (C. C.) 97 Fed. 245; Kinnear Manf'g Co. *v.* Carlisle, 152 Fed. 933, 82 C. C. A. 81.

The cases thus far referred to involve the relation between employees in the same department of labor, including engineer and fireman and conductor and brakeman of the same train, engineer on one train and conductor on another, brakeman on regular train and conductor of wild train, foreman and employee in repair or manufacturing shops, and yardmaster and fireman of switchyard. The authorities are equally express that the relation of fellow servant is not taken away by the fact of their employment in different departments of the same general service. In Quebec S. S. Co. *v.* Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656, a ship's carpenter in the deck department was held a fellow servant of the porter in the steward's department. In Northern Pacific R. R. Co. *v.* Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009, a common day laborer in the employ of the railroad company, working under the direction of a foreman on a culvert on the line of the railroad was held a fellow servant with the engineer and conductor engaged in operating a passenger train upon the same road; the court saying (page 357 of 154 U. S., page 984 of 14 Sup. Ct. [38 L. Ed. 1009]):

"As a laborer upon the railroad track, either in switching trains or repairing track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such train is a risk which may or should be contemplated by him in entering upon the service of the company."

In Texas & Pacific Ry. Co. *v.* Burman, 212 U. S. 536, 29 Sup. Ct. 319, 53 L. Ed. 641, both the engineer of an express train and the section foreman were held fellow servants of a section hand. In Louisville & Nashville R. R. Co. *v.* Stuber, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696, this court, speaking through Judge (now Mr. Justice) Lurton, held that a foreman of water supply, whose business was to supervise and repair tanks and pumping machinery at the water stations, is a fellow servant of the engineer of a passenger train with whom he was riding from station to station in the performance of his duties.

In Morgan *v.* Vale of Neath Ry. Co., L. R. 1 Q. B. 149, the reason for the rule which treats those employed in operating the road as fellow employees with those engaged in keeping it in condition is thus tersely stated by Erle, C. J.:

"Whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule."

It will be noted that in the Hambly, Burman, Stuber, and Morgan Cases the injured employee was not engaged in the work of operating trains, but in keeping in order the roadbed or structures used in such operation. They were held, however, to be engaged in the general work of railroad operation, and so within the fellow servant rule. Their relations to the operation of the road are of the same class as those of the plaintiff here. The cases we have cited are sufficient authority for the proposition that the plaintiff and the baggageman in question were fellow servants, as being both engaged in the general work of operation.

The question thus arises whether the record shows without dispute either that the method used by the baggageman of kicking or throwing the ice off the rapidly moving train was in accordance with a fixed purpose and plan adopted by the company, or that there existed a custom on the part of the railroad company to make deliveries of the ice in the manner stated. It may be conceded, at least for the purposes of this opinion, that if the record does show beyond dispute that the defendant company, by the action of any one authorized to represent it in that regard, had adopted such practice, or if the general custom has been proven so long continued as that defendant would be presumed to have known it, or to be negligent in not so knowing it, it would be liable. Plaintiff's counsel has contended, by brief and oral argument, that the adoption of such practice by the defendant is shown by the stipulation of facts. We do not so construe the stipulation. The language goes no farther in this regard than to state that:

"The bag of ice was put upon the train for the purpose of being thrown or kicked off at this place. It was company ice; that is, ice which the railroad company furnished to its section men in warm weather, and was thrown off at this place for the use of its employees."

And that:

"This bag of ice was directed by the depot agent at the town of Wickliffe to be so kicked off of that fast-running train, and when it was placed upon the train by the agent, or by his orders, it was known that the train would not stop at that place, and

it was indicated that it should be kicked off from the train when running at this high rate of speed."

Beyond the statement that the ice in question was "ice which the railroad company furnished to its section men in warm weather," there is nothing in the stipulation of facts necessarily connecting the defendant company with the adoption of the method of delivery in question, viz., the kicking or throwing of the ice from the rapidly moving train, unless by the statement that the ice was so delivered with the knowledge, under the direction, and according to the intent of the station agent at Wickliffe. Unless, therefore, it appears that the station agent at Wickliffe had authority to represent the defendant in adopting the method of delivery of the ice in question, and so was clothed with a superior or controlling duty to the plaintiff in that regard, it is clear no action to that effect on the part of the defendant company appears. But the record is entirely silent as to the authority of the station agent, and, to say the least, such controlling or superior authority and duty on his part cannot be presumed. As said by Judge Taft in Grady *v.* Southern Railway Company, 92 Fed., at page 494, 34 C. C. A., at page 497:

"The Baugh Case has set such limits to the vice principal doctrine that it is exceedingly difficult to suggest a position, outside of the superintendent or acting superintendent of the various great departments of the road, which will not be filled by fellow servants of all the other employees."

And in Thomas *v.* Cincinnati, N. O. & T. P. Ry. Co., *supra*, the same eminent jurist, commenting upon the duties of the yardmaster, which were held not to be of such superior nature as that he represented the railroad company, as between himself and the switchman, used this language:

"The nature of his duties was not at all unlike that of a station agent, only that he had more men under him. He was subject to the orders of the superintendent."

We are not to be understood as holding that the station agent could not, or in fact did not, have authority, express or implied, to represent the company to the extent of directing the method of the delivery of the ice in question, but only that we cannot presume that the powers of the station agent embraced the authority to promulgate, as a superior or superintendent, the order in question.

As to the alleged custom: If the stipulation can be construed as covering any custom to this effect, it falls short of stating a custom so general that it will be presumed to have been known to the defendant. We need not go outside the decisions of this court for authority that such notice is necessary in order to bind the defendant. B. & O. Ry. Co. *v.* Doty, 133 Fed. 866, 67 C. C. A. 38; Carnegie Steel Co. *v.* Byers, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.), 677; Morgan Construction Co. *v.*

Frank, 158 Fed. 964, 86 C. C. A. 168. It is true that these decisions are in cases involving defects in machinery or appliances; but the reason for the rule is no different with respect to the existence if a custom. In Southern Ry. Co. *v.* Rhodes, 86 Fed. 422, 30 C. C. A. 157, where it was sought to hold a railroad company liable for an injury to a passenger, through being hit by a mail pouch thrown by the post office employees from a moving train, it was held by this court, speaking through Judge Severens, that the duty to notify passengers of such danger and to take such steps as might be necessary to prevent a continuance of the practice did not arise until the railroad company had notice of such practice, either express or implied, from its long continuance. The facts that in the Rhodes Case the negligent act of throwing the pouch was done by a post office employee rather than a railway employee, and that the person hit was a passenger rather than an employee, do not affect the principle involved, as to the requirement of notice.

Do the agreed facts show a breach of duty on the part of the defendant in respect to providing the plaintiff a safe place to work? In our opinion, such breach of duty is not shown. There is no claim that at the place where the injury occurred there was any defect in the railroad track, structures, or appliances. Of itself it was a safe place to work. It was made unsafe only because of the negligent acts of those engaged in the operation of the road; for it is clear that the delivery of ice to workmen engaged in the work of keeping the road and track in order is a part of the operation of the road. The rule is well settled that, while the railroad company owes a positive and nondelegable duty to its employees with respect to the construction and maintenance in proper repair of its cars, tracks, and other appliances, yet with respect to the operation of the road its duty extends no further than to exercise ordinary care to provide a sufficient number of reasonably competent employees, make proper rules for their government, and to exercise proper supervision over them. When that has been done, it is not liable for an injury to an employee in the operation of the road through the negligence of other employees in the operating department, or their failure to observe the rules, notwithstanding such negligence makes the place unsafe to work in. In Martin *v.* Atchison, T. & S. F. Ry. Co., 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051, the plaintiff, a laborer in the employ of the railroad company, while on a hand car proceeding to his work was run into by a train. It was argued that the defendant violated its duty to see that the plaintiff had a reasonably safe place in which to perform his work, through the negligence of the foreman in failing to warn the plaintiff of the danger, as he had agreed to do. It was held that the doctrine as to the duty of the master to furnish a safe place for the servant to work in had no ap-

plication. In Pennsylvania Co. *v.* Fishack, 123 Fed. 465, 59 C. C. A. 269, the negligence of a switch yardmaster, in directing a train to take a certain track, with information that it was open when it was not, caused a collision. It was held that the act of the switch yardmaster was not a breach of the duty to provide a safe place to work, but that the act complained of was one of operation. In that case Judge Cochran, who wrote the opinion of this court, reviewed a large number of cases sustaining the undoubted rule above stated. The following cases, in addition to those cited in Penn. Co. *v.* Fishack, support the rule there stated: American Bridge Co. *v.* Seeds (C. C. A., 8th Circuit), 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; Kinnear Mfg. Co. *v.* Carlisle, *supra;* Portland Gold Min. Co. *v.* Duke (C. C. A., 8th Circuit), 164 Fed. 180, 182, 90 C. C. A. 166. See, also, Neagle *v.* Syracuse, etc., Ry. Co., 185 N. Y. 270, 77 N. E. 1064.

None of the cases cited on plaintiff's behalf, in our judgment, conflict with the rule we have stated. Thus, in Choctaw, Okla. & Gulf Ry. Co. *v.* McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, the negligence, which was held to be that of the railroad company, consisted in so maintaining a water tank spout as to collide with a brakeman at his post of duty upon a freight train. This was clearly a breach of a nondelegable duty to provide the employee with a safe place to work. Such construction was no part of the operation of the railroad. In Kentucky Block Cannel Coal *v.* Nance, 165 Fed. 44, 91 C. C. A. 82, decided by this court, the plaintiff, while doing mining work, was injured by the fall of a drain pipe in course of removal from a worked-out portion of the mine, through the negligence of those engaged in the removal of the pipe. It was held that the plaintiff and the workmen whose negligence caused the fall of the pipe and resulting injury were not fellow servants, for the reason that plaintiff was engaged in the work of operating the mine, while the negligent servants were engaged in the dismantling of a place provided for the work of the operation, and so represented the master in a duty to the servant equally nondelegable as the work of original construction. In Northwestern Fuel Co. *v.* Danielson (C. C. A., 8th Circuit), 57 Fed. 915, 6 C. C. A. 636, plaintiff was employed by defendant to shovel and remove coal from a burning dock. While plaintiff was so at work under two bents which formed a part of the trestlework upon the dock, he was injured by the falling of the bents, occasioned by the negligence of two foremen engaged in the work of tearing down the trestle, and that of the superintendent under whose direction the foremen were so engaged, in failing to notify the plaintiff that the trestle was being taken down. It was held (so far as material to this case), not only that the superintendent was the representative of the master, but that the foremen engaged

in the work of demolition were not the fellow servants of the plaintiff, because they represented the defendant in the nondelegable duty of keeping the place in which plaintiff was at work reasonably safe. In McCabe & Steen Const. Co. *v.* Wilson, 209 U. S. 275, 280, 28 Sup. Ct. 558, 52 L. Ed. 788, it was held that the superintendent of construction and foremen of the bridge gang engaged in supervising and directing the work on a bridge represented the principal with respect to the duty to provide a safe and suitable place and structures for its employees to work in, and so were not fellow servants as to a fireman engaged in the movement of a train over the bridge, viz., engaged in the operation of the road as expressly distinguished from the work of construction. In Santa Fé & Pacific R. R. Co. *v.* Holmes, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094, it was held that a train dispatcher represented the company in the promulgation of orders for the operation of the train, and was thus not a fellow servant of the trainmen. The decision in the Homes Case is in accordance with the decided weight of authority previous thereto. This court has more than once asserted the same proposition (B. & O. Ry. Co. *v.* Camp, 65 Fed. 952, 13 C. C. A. 233; Felton *v.* Harbeson, 104 Fed. 737, 44 C. C. A. 188), and this proposition was recognized in Pennsylvania Co. *v.* Fishack, *supra*. We see nothing in the cases of Fletcher *v.* Baltimore & Potomac R. R. Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, and Peters *v.* George, 154 Fed. 634, 83 C. C. A. 408, opposed to the views we have expressed.

The conclusion reached is that the agreed facts did not justify a direction of verdict for the plaintiff. But while, under the facts on which the case was submitted, it would have been proper to direct a verdict for the defendant, yet such facts are not inconsistent with the existence of other facts, not embraced in the stipulation, upon which a liability might be established; and, as the agreement was made upon the trial, it must be held made for the purposes of, and limited to, that trial, and so cannot, under the practice which contemplates the production of proofs in open court, be held to preclude further or different proofs upon another trial.

The judgment must accordingly be reversed, and a new trial ordered.

SMITH *v.* WESTERN & A. R. CO. WESTERN & A. R. CO. *v.* SMITH.

(Supreme Court of Georgia, March 3, 1910.)

[67 S. E. Rep. 818.]

Master and Servant—Existence of Relation—Apprentice Fireman.* —If a person under due authority from a railroad company goes upon one of its engines, hauling a train, for the purpose of learning the duties of a fireman, and performs services for the company in order to gain such experience and knowledge of the work as will render him competent to act as a regular fireman and to receive pay as such, thus becoming what is called "a learner fireman" or "an apprentice fireman," he is, while thus acting, a servant of the company, although he receives no pay during the time of such preparatory service, and as such servant he is a fellow servant with the regular servants employed in the operation of the train on which he is engaged. Weisser *v.* Southern Pacific Ry. Co., 148 Cal. 426, 83 Pac. 439, 7 Am. & Eng. Ann. Cas. 636.

Master and Servant—Existence of Relation.—If only certain agents or employees of a railroad company have the authority to select "learner" or apprentice firemen, and to permit them to go upon the engine of the company with a view to learning the duties of a fireman, and some other employee of the company, without authority, issues a permit to a person for that purpose, his going upon an engine of the company under such a permit would be unauthorized; and if, while wrongfully there, he should be injured by the negligence of the engineer in running the engine, he would stand as a trespasser, and not as an employee.

Master and Servant—Existence of Relation.—Under such circumstances, if the engineer and conductor of the train permitted such person to go upon the engine and act as a "learner" fireman, they having no authority to grant such permission or to select such apprentice fireman, his presence upon the engine would not thereby become lawful, and he could not claim to be properly there as an employee of the company.

Master and Servant—Injury to Servant by Fellow Servant—Contributory Negligence—Statutes.—If the plaintiff's husband be found to have been an employee of the company, the rule laid down in Civ. Code, § 2323, which provides that if the person injured is himself an employee of the company, and the damage was caused by another

*See Alabama Great So. R. Co. *v.* Burks (Ala.), 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562 (person learning duties of brakeman was an employee of the railroad company, though he received no wages); Huntzicker *v.* Illinois Cent. R. Co. (C. C. A.), 11 R. R. R. 555, 34 Am. & Eng. R. Cas., N. S., 555 (person holding trainmaster's permit to ride on freight trains in the district to acquire familiarity with the duties of a flagman was an employee of the railroad when killed in a collision between its trains, while riding on one of them with its conductor's assent).

employee, without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery, would apply; but the interpretation of that rule would also apply to him, so that, if he were guilty of negligence contributing in any substantial degree to his own injury, he could not recover, the cause of action having originated prior to the act of 1909 (Acts 1909, p. 160).

Sufficiency of Evidence.—The evidence was such as to authorize the court to submit to the jury the question as to whether plaintiff's husband at the time of his death was a trespasser or an employee of the defendant, and it was error on the part of the presiding judge to fail to charge appropriate law on the subject of master and servant relative to a railroad company and its employees. Morris *v.* Georgia Railroad & Banking Co., 131 Ga. 475, 62 S. E. 579; Weisser *v.* Southern Pacific Ry. Co., 148 Cal. 426, 83 Pac. 439, 7 Am. & Eng. Ann. Cases, 636.

(a) The evidence was not such as to authorize a submission to the jury of the question of whether the decedent occupied the legal relation of a licensee towards the defendant company; and the mere employment of the word "licensee" by one of the witness, in describing the duties of a "learner" fireman, did not create such legal status, with the rights and liabilities incident thereto.

Issues for Determination.—If it should be determined that the decedent was an employee of the defendant company at the time of the occurrence which resulted in his death, it should then be determined what were his duties as a "learner" fireman, and whether he was in violation of any duty imposed upon him, or was guilty of negligence in any material degree contributing to his injury.

Review on Writ of Error.—Without intimating any opinion as to what should be the finding of the jury in regard to the issues of fact submitted to them, it is held on the bill of exception of the railroad company that it cannot be declared as matter of law that a verdict was demanded in its behalf.

(Syllabus by the Court.)

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by M. J. Smith against the Western & Atlantic Railroad Company. From the judgment, Smith brings error; the railroad company filing cross-exceptions. Reversed on the main exceptions, and affirmed on the cross-exceptions.

Atkinson & Born, for plaintiff in error.

Tye, Peeples, Bryan & Jordan and *R. I. & J. McCamy,* for defendant in error.

PER CURIAM. Judgment reversed in the first case, and affirmed in the second. All the Justices concur, except FISH, C. J., absent on account of sickness, and ATKINSON, J., disqualified.

MAUE *v.* ERIE R. CO.

(Court of Appeals of New York, April 5, 1910.)

[91 N. E. Rep. 629.]

Master and Servant—Safe Place to Work—Negligence—Question for Jury.—It is not negligence per se for a railroad to maintain an uncovered underground farm crossing without regard to its use or location, and, where the maintenance of such a structure is relied on by a servant to establish the charge of negligence against the railroad, there must be evidence of specific circumstances and conditions from which dereliction of duty may be inferred.

Master and Servant—Safe Place to Work—Negligence—Evidence.* —A master does not guarantee the safety of his servants, and he need only exercise reasonable care in providing a safe place in which to work, and he is not liable for mere error of judgment, but only for culpable negligence.

Master and Servant—Safe Place to Work—Negligence—Evidence. —A railroad maintained a regular place for the inspection of its trains. Two miles distant it maintained a bridge, and beyond that it maintained double tracks and a siding over an underground farm crossing which was uncovered. A brakeman familiar with the situation inspected one side of the train at the regular place for inspection, and then rode to the bridge where the train stopped. Without direction he proceeded to inspect the other side of the train. While at work the train started, and he continued his work, walking along with the train until he fell into the opening over the crossing. Another brakeman, if not employed at other work, would have assisted in inspecting the train at the regular place, and it did not appear whether he acted at the time under specific orders or in the general line of his duty. Brakemen were required to inspect cars and do all things necessary for the safe movement of trains. Held, that the maintenance of the uncovered crossing was not negligence, since the railroad in the exercise of reasonable care could not be chargeable with knowledge that the crossing would be a menance to its employees.

Chase and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by George Maue against the Erie Railroad Company.

*For the authorities in this series on the subject of the degree of care required of a railroad, as an employer, in furnishing and maintaining a safe place to work, see last foot-note of McConnell *v.* Pennsylvania R. Co. (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; last foot-note of Thomas *v.* Wisconsin Cent. Ry. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609; second foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

From a judgment of the Appellate Division (115 N. Y. Supp. 1131) affirming by divided court a judgment entered on the verdict of a jury for plaintiff, defendant appeals. Reversed, and new trial granted.

William L. Marcy, for appellant.
Ford White, for respondent.

WERNER, J. The judgment recovered by the plaintiff cannot be sustained upon the record before us, unless we are prepared to hold that it is negligence *per se* for a railroad corporation to maintain an uncovered underground farm crossing, regardless of its location and without reference to the manner in which the tracks are used in the particular vicinity. The plaintiff, a former employee of the defendant, brought this action under the employer's liability act (Consol. Laws, c. 31, §§ 200-204) to recover damages for injuries sustained by him at a place on the defendant's railroad known as "Letchworth crossing." The specific charge of negligence is that the defendant there maintained a dangerous opening or hole in its tracks, into which the plaintiff fell while in the proper discharge of his duty as brakeman in inspecting a train. The case is singular, in that the facts bearing upon the defendant's alleged negligence are practically undisputed. A short recital of these facts will reveal the precise point at which we think the plaintiff's evidence fails to sustain his complaint.

The defendant's railroad crosses the Genesee river upon a single track structure known as "Portage Bridge." To the west of the bridge are double tracks, and also a siding which begins at a point 550 feet west of the bridge and continues westerly for a distance of about 3,250 feet to what is known as the "Letchworth crossing." This crossing consists of an underground passageway which connects the two parts of the Letchworth estate, and its construction is of the kind known and proven to be in general use. The two sides of the passageway are flanked by walls of masonry which support stringers, upon which are superimposed the cross-ties and rails. There is no other covering over this crossing than that which is furnished by the stringers, ties, and rails where the tracks cross the underground passage. As will be seen from this description, the space between the two tracks over the underground passageway is not covered by anything. The opening is about 3 feet wide between the inside ends of the ties, and from 12 to 15 feet long between the supporting walls. At the time of the accident to the plaintiff this farm crossing had been thus maintained for a period of 28 years without mishap or casualty. At a point about 1,000 feet westerly from the farm crossing there is a yard-limit signal which indicates, as agreed by all the witnesses, that engineers are to have their trains under control upon the assumption that other trains may be within the

yard limits. This yard is a regular stopping place, because the double tracks on both sides of the river converge to the single tracks across the bridge, and also because it is equipped with cranes or tanks for supplying engines with water. It is not a switching place, nor a point designated for the regular inspection of trains. The plaintiff had been employed by the defendant for a period of three years preceding the accident. He had been a brakeman upon freight trains traversing this particular part of the defendant's railroad for at least four months, had passed over this farm crossing many times, both by day and night, and was familiar with the surroundings as well as with the custom in the stoppage of trains. Having thus briefly described the locus in quo and its usage, we now turn to a résumé of the plaintiff's story of the accident.

At 6 o'clock in the afternoon of April 25, 1906, the plaintiff left Buffalo as one of the brakemen in charge of a train of eighty freight cars drawn by two engines. The train arrived at Castile at about half-past 1 o'clock on the next morning. There the train stopped. One of the engines was disconnected, switched to a turntable, and turned for use in pushing the train on to Portage and across the bridge. While another brakeman assisted in the turning of this engine, the plaintiff began an inspection of the south side of the train. Equipped with lantern, oil can, hook, and waste, he worked from the caboose forward to the engine. In the course of his progress he discovered signs of a heated journal on the north side of the train, but, before he had time to go to that side, the train started. He stepped upon the engine and rode to the yard limits at Portage Bridge, where the train stopped. Without directions from any one, he alighted and proceeded westerly toward the caboose for the purpose of inspecting the northerly side of the train. This necessitated walking between the two tracks. After he had gone westward about 35 cars lengths, he came upon a heated journal, which he began to pack and oil. While thus engaged, the train started. He continued his work on the heated journal, walking along five or six steps with the slowly moving train. Meanwhile his lantern, which he had set on the ground, went out, and he moved back to get it. He relighted the lantern and walked westward toward the rear of the train, intending to take note of the journals as they passed him. After he had taken four or five steps toward the west, he fell into the opening over the farm crossing above described, and sustained the injuries set forth in the complaint. The case, as now presented, turns wholly upon the question whether the defendant was negligent in maintaining this farm crossing without a deck or cover, and it is, therefore, unnecessary to discuss either of the other questions presented by counsel.

The undisputed evidence is that the structure known as "Letchworth crossing" is a typical underground farm passageway, in

general use upon the railroads of the country, and this evidence is in accord with common knowledge of the subject. Wherever farm lands have been bisected by railroad embankments, such crossings are familiar objects. It goes without saying that many such crossings are so situated that no one would think it essential to cover them for the protection of railroad employees. Railroad bridges with two or more tracks are usually left with an open or unplanked space between the tracks, unless located in a place where switching, coupling, or other work about trains necessitates the frequent, safe, and convenient passage, to and fro, of employees. In view of these general considerations, it is obviously impossible to hold the defendant responsible upon the broad ground that the mere maintenance of such a structure is, of itself, evidence of negligence, for that would involve the radical conclusion that all such structures are to be condemned as improper without regard to their use or location. It must follow, therefore, that, when the maintenance of such a structure is relied upon by a plaintiff to establish the charge of negligence against a defendant, there must be evidence of specific circumstances and conditions from which dereliction of duty may be inferred. In the application of that rule to the case at bar, the statement of a few additional facts will serve to show why the plaintiff has failed to make out his case.

It appears that Castile is a place where trains were regularly inspected. The crew in charge of this train numbered five men. The movements of none of these at Castile are accounted for except those of the plaintiff, who was engaged in his duty of inspecting the train, and of another brakeman who was busy in helping to turn the detached locomotive. The inference is permissible, if not necessary, that if this other brakeman had not been engaged with the locomotive he would have assisted in the work of inspection at Castile, and that he could have finished one side of the train while the plaintiff completed the other side. As it does not appear whether the other brakeman was acting under specific orders or in the general line of his duty in helping to turn the engine, we cannot assume that the defendant was chargeable with knowledge that the train had not been fully inspected at Castile. That being the regular place of inspection, it was not to be anticipated that, in the ordinary course of events, it would be necessary to continue at Portage Bridge, only two miles distant, an inspection begun but not finished. The natural inference would be that full inspection had been made at Castile, and that none would be necessary at Portage Bridge, beyond the casual oversight which might be dictated by prudence at any stopping place. It is entirely clear from the record that the plaintiff, in finishing his inspection at Portage Bridge, was not acting under specific orders, and the general rules defining his duties throw no light upon the question whether there was any such regular

or habitual inspection of trains at that place as to charge the defendant with knowledge that Letchworth crossing was a menace to the safety of brakemen. The rule promulgated by the defendant imposing upon brakemen the duty of making couplings, attending to brakes, displaying signals, assisting in loading and unloading freight, inspecting cars, and doing all other things necessary for the prompt and safe movement of trains, is general in its application and has no particular significance as applied to the conditions which existed at Portage Bridge. The plaintiff's testimony is not more definite. It tends to show that it is a brakeman's duty at all times to see that his train is in good condition, and that there are no defects in the brakes, running gear, or other appliances. That is a fact as to which there is no disagreement in the testimony, but it is also a fact which must be considered in the light of practical conditions. It relates to the brakeman's general duty of watchfulness as well as to the regular inspection of trains. The one is constant and extends over every fraction of the journey, while the other is usually to be exercised only at designated stations. It would be as unjust to hold that railroad corporations should be required to anticipate every possible emergency that may arise in the progress of trains as to absolve them from responsibility for the unnecessary maintenance of dangerous conditions at particular places where brakemen, in the regular inspection of trains, are subjected to perils which can be obviated by the exercise of reasonable care and prudence.

The principle by which this case is governed is so well settled and so generally understood as to render the citation of authorities almost superfluous. The master does not guarantee the safety of his servants. He is not required to furnish them an absolutely safe place in which to work, but is simply bound to exercise reasonable care and prudence in providing such a place. He is liable not for mere error of judgment, but only for culpable negligence. The experience of this unfortunate plaintiff has shown that under the peculiar circumstances of this case the uncovered opening was a place of danger, and the evidence tends to show that the defect is one which can be remedied. Over against these suggestions there is the stubborn fact that this farm crossing is of the standard construction in general use by the railroads of the country, and that the defendant has maintained it for 28 years without accident or injury to any one. The defendant's duty and liability are to be measured, not in the light of plaintiff's said mishap, but by the conditions which antedated it. If the defendant, in the exercise of reasonable care and foresight, had been chargeable with knowledge that this opening in its tracks might prove to be a menace to the safety of its employees, the plaintiff could sustain the judgment herein. But that is just where his evidence fails. In that respect his case is like Dougan

v. Champlain Transportation Co., 56 N. Y. 1, where a passenger slipped under the gangway rail of a steamboat, fell overboard, and was drowned. There it appeared that all the boats plying upon the same lake were constructed in the same way; that they had been thus maintained for many years; that no similar accident had ever happened before; and that the defect in the gangway rail was one which could be cured by a different construction. Quite similar is the case of Loftus *v.* Union Ferry Co. of Brooklyn, 84 N. Y. 455, 460, 38 Am. Rep. 533, where a child six years old, while leaving one of defendant's boats, fell through a guard rail and was drowned. In both of these cases the accidents proved the dangers, and the evidence tended to show that they might have been avoided. But this court held that liability was not predicable upon the accidents themselves, and that the real question was whether the defendants ought to have foreseen the dangers. In discussing that point in the Loftus Case, Judge Andrews said: "But the facts rebut any inference of negligence on this ground. The company had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child, or even a man, to get through the opening, was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty." Laffin *v.* Buffalo & South Western R. R. Co., 106 N. Y. 136, 141, 12 N. E. 599, 60 Am. Rep. 433, and Burns *v.* Old Sterling I. & M. Co., 188 N. Y. 175, 184, 80 N. E. 927, are familiar illustrations of the same rule. In all such cases the question of liability depends, not upon what can be seen by everybody after the happening of an accident, but by what the party sought to be held responsible should have known or anticipated before the occurrence. So long as an employer is not an insurer, his liability must depend upon his exercise of that degree of care which would suggest itself to the mind of the ordinary man of average caution and prudence under conditions which prevail before any accident has happened. We think that the defendant, judged by that standard, has not been shown to be guilty of culpable negligence.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CHASE, J. (dissenting). The plaintiff, while in the performance of his duty as a rear brakeman on a freight train of the defendant, fell to the roadway of an underground farm crossing through an opening between the east and west bound tracks of the defendant's railroad and received serious injuries for which he seeks to recover in this action.

The general plan of the farm crossing was one common in railroad construction. A roadway 12 or 15 feet wide was carried across and under the railroad tracks 18 feet below their

level. Stone abutments were erected on either side of such roadway, and on such abutments were placed stringers on which the ties and then the rails were laid. Such construction left an open space between the two sets of tracks, which was about 3 feet wide and extended over the crossing. The plaintiff at the time of the accident was employed on an east-bound train consisting of 80 loaded cars. The farm crossing in question is less than one-half mile westerly of Portage Bridge over the Genesee river. Castile is a station about 4 miles westerly of Portage Bridge. The train upon which the defendant was employed reached Castile about 1:30 o'clock in the morning. It there stopped, and one of the two engines drawing the train was detached and turned upon a turntable preparatory to being used to assist in pushing the train to and over Portage Bridge. The head brakeman assisted in the work with the engine, while the plaintiff, in accordance with his duty, took a lantern and certain appliances and proceeded to examine the running gear of the train. He commenced on the southerly side of the train and continued along that side thereof, swinging his lantern between the cars and examining the running gear and appliances, including the journals. He found that three of the journals on the southerly side of the train had become hot, and required that the packing should be readjusted, and he added oil from an oil can which he carried. When he had finished inspecting the southerly side of the train, it was about to start, and he got upon the engine and rode thereon until the train reached the regular stopping place immediately west of Portage Bridge. The bridge at that point has but one track, and there is a general rule of the defendant that all trains must stop before proceeding over the Portage Bridge, and there is also a water spout near the bridge from which water is taken for the engine. When this train stopped at Portage Bridge, the plaintiff started on the northerly side thereof, walking, as he was required to do, between the two tracks inspecting the cars from the northerly side as he had done at Castile on the southerly side. Before he left Castile he knew from a particular odor that there was a heated journal or journals on the northerly side of the train. In proceeding westerly with his inspection of the northerly side of the train he found a journal about 35 cars from the engine that was heated, and with a peculiar hook he made what he called a "pocket" about the journal and filled it with oil. As he was doing so, the train started and proceeded easterly. He had placed his lantern upon the ground while he was repacking the journal. It had fallen on its side and the light had gone out. He walked with the train four or five steps to complete the work that he was doing. He then turned and picked up his lantern and lighted it, put it on his arm, and picked up his other appliances and turned westerly, intending to get upon the train and proceed with it, as he

knew that the next stopping place was about 15 miles easterly, and he took a few steps to the westerly, watching the journals of the cars by the light of his lantern as they passed, he fell into the open space between the tracks, as stated.

The rules of law applicable to this case are simple and well known. It is not necessary to state them. The plan or construction of the farm crossing is not in controversy. The question to be determined is whether the defendant, under the circumstances disclosed in this case, was negligent in leaving said space open and uncovered. It was entirely practical to cover it by the use of timbers and planking. It appears that it is the usual custom to cover similar openings when they are within yard limits where switching of cars and the making up of trains is a common occurrence, and it also appears that it is not the custom of railroads generally to cover similar openings along the line of their roads where the trainmen are not required to walk between the tracks for the inspection of their trains or for any purpose except in cases where the train is there stopped and held for some unforeseen and unusual reason. One of the witnesses called by the defendant as an expert, referring to the space between the tracks, testified: "When it is necessary for trainmen to pass back and forward daily and several times a day, I regard it as necessary to cover them." I think that the evidence discloses a situation at the farm crossing mentioned which made the question of the defendant's negligence in failing to cover the opening for the protection of its employees a question of fact. It appears, as I have stated, that every train was required to stop before crossing the bridge, and that the defendant had there provided a water spout from which water could be taken for the use of the engine, and that it required 10 minutes or more to take such water. It also appears that the farm crossing was within the space covered by an ordinary freight train while standing west of the bridge in obedience to the orders of the company and for the purpose of taking water. It further appears that there was a yard-limit sign some distance west of the farm crossing. It may be helpful in considering the question as to the negligence of the defendant to refer more specifically to the significance of the defendant's yard limits at that point.

Within the yard limits of a yard where switching of cars is done and trains are made up there are special rules to govern the different employees therein. The yard limits at Portage Bridge are very significant, but switching was not ordinarily done within such yard limits, and trains were not made up there, except that there was one switch therein upon which crippled or disabled cars could be placed if found in the train when it was standing there prior to crossing the bridge and while taking water. The yard limits were there established because every train was compelled to stop before crossing the bridge, and also because they

might stand there for 10 or 15 minutes for the purpose of taking water. The yard limits there meant to every trainman upon trains approaching such yard limits that they should have their trains under control to avoid a collision in view of the fact that it was always possible that a train would there be standing upon the tracks. Because such yard limits were there established it was not necessary for the rear brakeman when his train stopped to go back to signal a possible approaching train. If a train stopped on the tracks of the defendant at any point outside of yard limits, it was the duty of the rear brakeman to proceed on the track back of the train with a signal for the purpose of protecting his train from collision from the rear, and he could not, therefore, inspect the running gear and apparatus of his train at that time. It is not to be presumed, therefore, that trainmen will be required to run along the sides of their train at points upon the road where they do not stop except in case of accident or unforeseen circumstances. The space between the tracks over the farm crossing in question was directly in the path that the plaintiff as a brakeman was required to travel in doing the work that he was required to do. It appears without contradiction that it is not a brakeman's duty to inspect the running gear of his train every time it stops, but that it is his duty to inspect the running gear at certain stops that are made under general orders including the stop at Portage Bridge. When stops are made outside of yard limits, the time of the brakeman is wholly taken up in protecting the train from collisions; but in cases where a stop is made by general order and within yard limits their time is not so employed.

The defendant's superintendent for that part of its road, including the yard limits at Portage Bridge, testified: "The conductor and his men are required to look over the wheels and the running gear of their trains whenever they stop long enough at any one point to permit its being done. That inspection usually takes place at points where the engine or engines stop for water."

The testimony of the superintendent that I have just quoted, read with the testimony of the defendant's expert from which I have also quoted, is express authority for the conclusion of the jury that it was negligence in the defendant not to cover such opening. On this particular train there were five men in the train crew. At Castile the engineer and fireman were engaged on their engine—the conductor and head brakeman were assisting in the work of the second engine, and it left the plaintiff alone to inspect the train. When he left Castile he knew that the running gear at some point on the north side of the train needed attention, and the attention which he gave it while the train was stopping at the bridge was in his immediate line of duty. A hot journal, unless cared for, may result in so burning out

the bearings as to wreck the train. If the plaintiff, under the circumstances disclosed, had not inspected the north side of the train as he did while it was standing at the bridge, he would have been negligent in the performance of his duty.

The trial court was right in submitting to the jury the question whether, under the circumstances disclosed, it was not the duty of the defendant to cover the opening between the tracks in the yard limits at Portage Bridge the same as it covered similar openings in its yard limits where cars are switched and trains made up.

This court has frequently held that a defendant's negligence was a question of fact in cases where the particular circumstances did not show a greater duty toward railroad employees than is shown in this case. Plank *v.* N. Y. C. & H. R. R. R. Co., 60 N. Y. 607; Fredenburg *v.* Northern C. R. Co., 114 N. Y. 582, 21 N. E. 1049, 11 Am. St. Rep. 697.

The question of the plaintiff's contributory negligence and of his assumption of the risk are questions of fact. Plank *v.* N. Y. C. & H. R. R. R. Co., *supra;* Wallace *v.* Central Vermont R. R. Co., 138 N. Y. 302, 33 N. E. 1069; Labor Law, § 202, formerly section 3, c. 600, Laws 1902; Guilmartin *v.* Solvay Process Co., 189 N. Y. 490, 82 N. E. 725; Clark *v.* N. Y. C. & H. R. R. R. Co., 191 N. Y. 416, 84 N. E. 397.

The judgment should be affirmed, with costs.

CULLEN, C. J., and HAIGHT and WILLARD BARTLETT, JJ., concur with WERNER, J. HISCOCK, J., concurs with CHASE, J. VANN, J., not sitting.

Judgment reversed, etc.

LOUISVILLE & N. R. Co. *v.* TROUTMAN.

(Court of Appeals of Kentucky, April 26, 1910.)

[127 S. W. Rep. 474.]

Railroads—Construction—Farm Crossings—Statutes.—Where a railroad cut plaintiff's farm into two parts, an arrangement entered into by the railroad company with an adjoining landowner that plaintiff might use his crossing, which would necessitate plaintiff's traveling half a mile each way to cross the railroad track to get to his land, which he desired to use, when if he went by a direct route from his house it would only be a short distance, was not a compliance with the railroad's charter, requiring that, where it was necessary to pass through the land of any person, the railroad should provide proper wagon ways across the railroad.

Railroads—Construction—Farm Crossings—Charter Obligation.—A railroad's charter duty to furnish farm crossings was a continuing obligation, which was enforceable by the landowner whenever the necessity therefor arose.

Appeal from Circuit Court, Bullitt County.

Action by H. F. Troutman against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Faurest, Benjamin D. Warfield, and *Chas. H. Moorman,* for appellant.

J. F. Combs, for appellee.

HOBSON, J. H. F. Troutman owns a farm in Bullitt county, containing about 200 acres. Forty acres of the tract lies on the east side of the Louisville & Nashville Railroad, and 160 on the west side. The charter of the Louisville & Nashville Company among other things provides that, "where it shall be necessary to pass through the land of any person, it shall also be their duty to provide for such person proper wagon ways across said railroad from one part of the land to the other; and if said company shall fail to provide proper wagon ways across said road, as provided in this section, it shall be lawful for any person to sue said company and be entitled to such damage as a jury may think him or her entitled to for such neglect." Construing this provision, this court held in Louisville & Nashville Railroad Company *v.* Emerson, 125 Ky. 104, 100 S. W. 863, that the duty to provide proper wagon ways across the railroad is continuous, and that the crossings must be provided as the changed conditions make them necessary. The house on Troutman's tract was west of the railroad, and there was no crossing on the land, so that he could get from one

side of the railroad to the other. He applied to the railroad company to put him in a crossing opposite the house. The company sent out one of its engineers, who told Troutman that the point he had selected was not a good place for a crossing, owing to the fact that the road was there on a fill, and there would be danger of teams stalling in going up. He and Troutman then agreed on the location of the crossing 1,760 feet south of milepost 20. The railroad company entered into a contract with John Newman, who had a crossing at the north line of Troutman's land, by which Newman agreed with the railroad company that the persons owning the Troutman tract might use his crossing. This crossing is 967 feet south of milepost 20, or 793 feet north of the point where it was agreed between the engineer and Troutman the crossing might be placed. The company refused to put in the crossing on Troutman's land, claiming that by the agreement with Newman it had provided him a proper wagon way across the railroad from one part of the land to the other. Troutman brought this suit to require it to put in the crossing and to recover damages for its failure to do so. On the trial of the case the circuit court entered a judgment in his favor, fixing the damages at $45. From this judgment the railroad company appeals.

According to the evidence it is about one-half mile from Troutman's house to the Newman crossing. To cultivate or use in any way the greater part of the 40 acres that lies on the east side of the railroad, Troutman must go up the railroad a half mile, there cross it, and then come back about a half mile to the land he wishes to use, when if he went in a direct route from the house to the land it would be only a short distance. The circuit court did not err in holding that this was not, within the meaning of the statute, a proper wagon way across the railroad from one part of the land to the other. Such a way would so far impair the use of the land on the east of the railroad as to make its cultivation or grazing as a pasture impracticable, except at great loss of time and labor. The statute was intended to require that such crossings as were reasonably necessary for the fair use of the land should be put in. The land has heretofore been in timber, and therefore the question of the crossing did not arise; but, now that the land is cleared and occupied as a residence, a different condition is presented, and the owner is entitled to a reasonable wagon way from one part of his land to the other. To require Troutman to go upon the crossing of Newman, and then follow the county road back to his land, would be to furnish him a crossing not contemplated by the statute. The statute contemplates that the crossing shall be from one part of the land to the other.

Judgment affirmed.

JONES *v.* PENNSYLVANIA R. CO. *et al.*

(Court of Errors and Appeals of New Jersey, Feb. 28, 1910.)

[75 Atl. Rep. 907.]

Railroads—Duty to Warn Travelers at Crossing—Delegation of Performance.—The duty imposed by law upon a railroad company to exercise care about warning travelers at a crossing cannot be evaded by delegating its performance to others.

Trial—Verdict.—After the trial of an action of tort brought against two defendants, the jury, having retired to consider of their verdict, returned into court and delivered the verdict to the deputy clerk (the judge being absent). Being asked if they had agreed, they responded in the affirmative, and that the foreman would speak for them. The foreman then declared that the jury found the defendants guilty, and assessed the damages, $3,000 against one defendant, and $3,000 against the other defendant (naming them). The deputy clerk thereupon said to the jury: "Gentlemen, hearken to your verdict as the court has ordered it recorded; you find the defendants [naming them] guilty, and assess the damages of the plaintiff at the sum of $6,000"—and to this the jury all agreed. Held, the assent of the jury to the statement of their verdict as formulated by the deputy clerk sufficiently showed that their assessment of damages was $6,000, and not $3,000, and warranted the entry of judgment against both defendants for the larger sum.

(Syllabus by the Court.)

Error to Circuit Court, Camden County.

Action by Mollie E. Jones against the Pennsylvania Railroad Company and another. Judgment for plaintiff, and the mentioned defendant brings error. Affirmed.

Gaskill & Gaskill, for plaintiff in error.
Wescott & Wescott, for defendant in error.

PITNEY, Ch. The plaintiff, while riding as a passenger upon a street railway car in the city of Camden operated by the Public Service Corporation, was injured in a collision that occurred between that car and a railroad train operated by the Pennsylvania Railroad Company. To recover her damages she sued both companies jointly. The action resulted in a judgment in favor of the plaintiff and against both defendants. The Pennsylvania Railroad Company alone prosecutes this writ of error.

The only questions raised are: (1) Whether the trial court erred in refusing motions for nonsuit and for direction of a verdict in favor of the plaintiff in error; and (2) whether the court erred in refusing a motion subsequently made for arrest of judgment and award of a venire de novo, this motion being

based upon an alleged irregularity in the taking and recording of the verdict.

The first question turns upon whether there was any evidence of negligence on the part of the plaintiff in error. The bills of exception disclose that at the place in question the tracks of the Pennsylvania Railroad Company cross the street at grade, and that at the time of the collision this company was engaged in construction work preparatory to the elevation of its tracks. The grade crossing was still in use, and was guarded by gates so far as the principal tracks were concerned. But there was a temporary construction track that ran along outside of the gates, and on that side from which the street car approached. On each side of the crossing the retaining wall of the proposed railroad embankment had been constructed to a sufficient height, and near enough to the street railway tracks to seriously interfere with the view of approaching railway trains by the motormen operating the street cars. The negligence attributed to the plaintiff in error consisted in this: That a train was backed down along the construction track to and over the crossing without giving proper warning to travelers upon the street (including the motorman of the street railway car, in which plaintiff was riding), and without guarding the construction track by gates or giving adequate danger signals.

The statute prescribes an audible signal to be sounded by every engine approaching a grade crossing of a highway, beginning at a distance of 300 yards from the crossing. P. L. 1903, p. 663, § 35. An audible signal of such duration was rendered impracticable by the fact that the train in question started from a point much less than 300 yards from the crossing. But this fact, while not dispensing with the giving of such audible signal as was practicable in the circumstances, tended to show that some precaution besides an audible signal was called for. For this reason, and because the evidence warranted a finding that the railroad company had itself created a situation of extraordinary danger at this crossing, the jury might very reasonably conclude that the exercise of reasonable care for the safety of travelers upon the street required the railroad company to employ a flagman, or install gates for the construction track. Penna. R. R. Co. *v.* Matthews, 36 N. J. Law, 531; D. L. & W. R. R. Co. *v.* Shelton, 55 N. J. Law, 342, 26 Atl. 937.

It appears that the plaintiff in error contented itself (so far as safeguarded the construction track was concerned) with contributing to the employment by the street railway company of a man (Carney by name) whose duty it was to signal to approaching street cars when danger was to be apprehended from an approaching railroad train. It is unnecessary to say that the fact that the railroad company employed such a man, or contributed to his employment, is not sufficient to exonerate that

company. The duty of taking care to warn travelers at a railroad crossing is one that cannot be evaded by delegating its performance to others. See 1 Thomp. Negl. § 665. There was evidence from which the jury might reasonably infer that this employee was negligent; that although he gave a warning to the approaching street car, it was so tardily given as to be of no service. Therefore, upon the evidence, negligence was attributable to the railroad company in failing to exercise care to warn the motorman of the street car that the construction train was approaching; and this, irrespective of whether the man Carney was properly to be deemed the agent of the railroad company. The fact that the evidence tended clearly to show that the Public Service Corporation was likewise negligent of course does not debar the plaintiff her action. It results that there was no error in refusing the motions for nonsuit and for direction of a verdict.

The sole remaining attack upon the judgment is rested upon the refusal of the motion made for arrest of judgment and award of a venire de novo. This motion was based upon the alleged ground that, while the jury in fact rendered two verdicts, viz., one against each of the defendants, and for $3,000 each, the deputy clerk of the court (who received the verdict in the absence of the judge) arbitrarily entered a joint verdict for $6,000 against both defendants. Passing by the question (stirred, but not fully argued) whether the error alleged in this regard is reviewable by writ of error (see Davis *v.* Township of Delaware, 41 N. J. Law, 55; Id., 42 N. J. Law, 513, and cases cited), an examination of the bill of exceptions upon which the present attack is based convinces us that there was no judical error in the refusal of the motion referred to.

The moving party (now plaintiff in error) undertook to show the facts upon which the motion was based, by evidence taken viva voce before the judge of the circuit court. From this evidence it appeared that at the conclusion of the trial the jury retired to consider of their verdict; that upon their return, the trial judge being absent, the deputy clerk proceeded to take the verdict; that he called the roll of jurymen, and asked them if they had agreed upon the verdict, to which they responded in the affirmative, and said that the foreman would speak for them. The foreman, being asked, declared that the jury found the defendants guilty, and assessed the damages, $3,000 against the Pennsylvania Railroad Company, and $3,000 against the Public Service Corporation. Thereupon the clerk said to the jury: "Gentlemen, hearken to your verdict as the court has ordered it recorded; you find the defendants, the Pennsylvania Railroad Company and the Public Service Corporation, guilty, and assess the damages of the plaintiff at the sum of $6,000"—and to this the jury all agreed and the verdict was so recorded, and judg-

ment rendered against the two defendants jointly for $6,000 damages.

It is clear, we think, that the court below properly held that the verdict as thus recorded was the verdict intended to be rendered and actually rendered by the jury. The function of the jury in such a case is twofold: First, to pass upon the issue, guilty or not guilty; and, secondly, if they find the defendant or defendants guilty, they are to assess the damages of the plaintiff. It is no part of the jury's duty to apportion the damages as between two defendants in an action of tort. In the case at hand, therefore, the deputy clerk was confronted with the question whether by the utterance of the foreman it was intended to say that the damages were $3,000, or that the damages were $6,000, of which each defendant should pay $3,000. The query that he put, and the assent of the jury to it, sufficiently showed that their assessment of damages was $6,000, and not $3,000, and warranted the entry of the verdict and judgment accordingly.

No error being found, the judgment should be affirmed.

CLARK *v.* ST. LOUIS & S. F. R. CO.

(Supreme Court of Oklahoma, Sept. 14, 1909.)

[108 Pac. Rep. 361.]

(Syllabus by the Court.)

Negligence—Question for Jury.—When the evidence is conflicting, or when the facts are undisputed, but different minds might reasonably draw different conclusions from them, the question of negligence is always for the jury.

Railroads—Crossing Accidents—Question for Jury—Negligence.—In an action to recover damages for alleged negligence, whereby the plaintiff was injured at a railroad crossing, it appeared that the plaintiff at the time of the accident was driving north on a street in a village towards the railroad crossing in a farm wagon covered with a wagon sheet, the corners of the sheet being tied down at each end. At the point of collision the railroad track runs east and west, the street running north and south. The plaintiff was driving a team of gentle horses, and was traveling about three or four miles an hour. As he approached within about 50 feet of the crossing, he stooped forward, looked up and down the track, and listened for approaching trains, but did not see or hear any; that from the place where he looked and listened he could see the track to the east, the direction from which the train was coming, for a distance of 500 or 600 feet, the view beyond that being obstructed by a section house which stood east of the street on which he was traveling and near the track; that after

he looked and listened he sat down on the wagon seat, which was 18 or 20 inches under the wagon sheet, and drove on towards the crossing in an ordinary walk; and continued at this pace until his wagon was struck by the train; that he knew the crossing was there, having crossed it several times before; that his hearing and eyesight are fairly good; that before the accident the bell of the engine did not ring, neither did the whistle blow; that he did not see any part of the train or engine, and did not know there was a train approaching until he was struck; that the train was about 2½ hours late and was running at the rate of 30 or 40 miles an hour, and no effort was made to stop it before the collision occurred. Held, that the questions of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, were questions of fact for the jury, and it was error for the court below to sustain a demurrer to such evidence.

Negligence—Last Clear Chance.*—The doctrine of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule the injured person may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part, to avoid the injury, after discovering the peril of the injured person.

(Additional Syllabus by Editorial Staff.)

Railroads—Crossings—Duty of Person Crossing.†—The presence of a railroad track on which a train may at any time pass is notice of danger to such an extent that it is the duty of a person about to cross the track on a public highway to exercise caution in so doing, and to stop, look, and listen before crossing, and it is negligence per se to omit such ordinary precautions.

Railroads—Crossing Accidents—Last Clear Chance—Application of Doctrine.‡—Where there was no evidence that the engineer in charge of a train which struck plaintiff at a crossing discovered plaintiff's peril until the accident, the doctrine of last clear chance does not ap-

*For the authorities in this series on the subject of the "last clear chance" doctrine, see last foot-note of Powers *v.* Des Moines City Ry. Co. (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first foot-note of Bourrett *v.* Chicago & N. W. Ry. Co. (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; fourth foot-note of Norfolk & P. T. Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

†See first foot-note of Garrison *v.* St. Louis, etc., Ry. Co. (Ark.), 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543; second head-note of Cottle *v.* New York, etc., R. Co. (Conn.), 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282; first foot-note of Blodgett *v.* Central Vt. Ry. Co. (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

‡For the authorities in this series on the question whether those in charge of trains or street cars have the right to act on the assumption

ply, though the engineer may have seen plaintiff approaching the track in a covered wagon, the engineer having a right to presume that a person so approaching the track had not omitted the ordinary precautions, and would stop in time to avoid an injury.

Error from District Court, Comanche County; F. E. Gillette, Judge.

Action by James H. Clark against the St. Louis & San Francisco Railroad Company. A demurrer to the evidence was sustained, and plaintiff brings error. Reversed and remanded for a new trial.

J. L. Hamon and *Chas. Mitschrich,* for plaintiff in error.
R. A. Kleinschmidt and *Flynn & Ames,* for defendant in error.

KANE, C. J. This was an action for damages for personal injuries, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, in the district court of Comanche county, Okl. The petition of plaintiff alleged, in substance, that he was injured at a railroad crossing at the town of Cache, in said county, by a train of defendant striking the wagon in which he was driving, and violently throwing him to the ground. The negligent acts complained of were the failure of the employees of the defendant to ring the bell of its engine, or whistle for the crossing, and the failure of the company to erect a sign board as required by law. The answer of the defendant was a general denial, and a plea that the injury resulted from the contributory negligence of the plaintiff. The evidence introduced on behalf of the plaintiff tended to show that at the time of the accident he was driving north on Fifth street, towards the railroad crossing in a farm wagon covered with a wagon sheet, the corners of the sheet being tied down at each end. At the point of the collision the railroad track runs east and west, the street being nearly level with it. The plaintiff was driving a team of gentle horses, and was traveling about three or four miles an hour; that as he arrived within about 50 feet of the crossing he stooped forward, put his hand on the dash board, looked up and down the track, and listered for approaching trains; that from the place where he looked and listened he could see the track to the east, the direction from which the train was coming, for a distance of about 500 or 600 feet, the view beyond that being obstructed by a section

that persons seen on or near tracks will avoid danger from trains or cars, see last foot-note of Norfolk & P. T. Co. v. Forrests' Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; second paragraph of second foot-note of Wilkinson v. Oregon Short Line R. Co. (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; last foot-note of Miller's Adm'r v. Illinois Cent. R. Co. (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396.

house which stood east of the street on which he was traveling, and near the track; that after he looked and listened he sat down on the wagon seat and drove on towards the crossing in an ordinary walk, and continued at this pace until his wagon was struck by the train; that he knew the crossing was there, having crossed it several times before; that his hearing and eyesight are fairly good; that before the accident the bell of the engine did not ring, neither did the whistle blow; that he did not see any part of the train or engine, and did not know there was a train approaching until he was struck; that no effort was made to stop the train by the trainmen before the collision occurred; that the train was about 2½ hours late, and was running at the rate of 30 or 40 miles an hour; that before plaintiff drove upon the crossing those within the wagon could not be seen by those outside on account of the wagon sheet covering the wagon; that the train consisted of two passenger coaches, baggage and mail car, engine and tender, and ran about the length of the train before they stopped after striking plaintiff's wagon; that the trainmen could have seen plaintiff's wagon 500 or 600 feet at a distance of 50 to 75 feet south of the crossing on Fifth street, and the nearer he approached the track the farther they could have seen him. After the plaintiff rested his case, the defendant interposed a demurrer to the evidence, which was sustained by the court, and thereupon the court excused the jury and entered judgment in favor of the defendant and against the plaintiff for costs. To review this judgment the case is now in this court by petition in error and case-made.

There are but two questions presented to this court for determination: (1) Was the plaintiff guilty of contributory negligence? and (2) if he was, is he entitled to the benefit of the doctrine of the last clear chance? Both parties agree that the court below sustained the demurrer to the evidence upon the ground that the plaintiff was guilty of contributory negligence, and that the demurrer to the evidence was sustained upon the authority of Severy *v.* C., R. I. & P. Ry. Co., 6 Okl. 153, 50 Pac. 162; the Supreme Court of Oklahoma territory basing its decision upon the Houston Case, 95 U. S. 697, 24 L. Ed. 542, and the Freeman Case, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. The plaintiff contends that the foregoing cases are not in point, and, further, that if the plaintiff was guilty of contributory negligence the failure of the railway company to attempt to avoid the accident when, by the exercise of proper care, it might have discovered the perilous situation of plaintiff in time to stop the train and avert the calamity was the proximate cause of the injury, and therefore the plaintiff was entitled to recover notwithstanding his negligence. In other words, he insists that he is entitled to the benefit of the doctrine of the last clear chance.

On the first proposition we believe it was error for the court

below to sustain the demurrer to the evidence. The case at bar is quite distinguishable from the cases hereinbefore referred to, upon which the judgment of the court below was based. In all of those cases it was admitted that the plaintiff did not look and listen before going upon the track. It is true that in the Severy Case there was no specific finding that the plaintiff did not look and listen, but Mr. Chief Justice Dale, who delivered the opinion of the court, no doubt inferred from the answers of the jury to several interrogatories propounded to it that he did not, and that the opinion is based upon that theory is obvious from the following language quoted from the opinion of the learned chief justice: "Under the facts as established in this case, it appears that the deceased at any time after he reached a point 49 feet west of the crossing might have, by casting his eyes to the west, discovered the approach of the train which caused his death; that it was his duty to have done so is too well established by the courts of this country to admit of doubt, and that he was negligent and thoughtless and took no account of the danger which might be encountered by reason of the operation of defendant's train is plainly apparent from the facts of this case."

It is well settled by the authorities that the presence of a railroad track, upon which a train may at any time pass, is notice of danger to such an extent that it is the duty of a person about to cross the track, on a public highway, to exercise caution in so doing and to look both ways for approaching trains, if the surroundings are such as to admit of such precautions. The reason for this rule which requires a traveler to stop, look, and listen, before crossing a railroad track, is, that by such action he may inform himself whether a train is approaching or not, the instinct of self-preservation being sufficient to keep a person from getting in front of such a deadly vehicle, when he knows it is approaching. On this proposition it is useless to multiply authorities; the courts have by almost uniform decision declared that it is negligence per se on the part of a traveler injured at a crossing to omit these ordinary precautions to protect himself. But in the case at bar it is admitted that the plaintiff did look and listen when about 50 feet from the track; that from this point he had an unobstructed view of the track to the east for a distance of 500 or 600 feet and saw no train; that beyond that point his view of the track was obstructed by the section house heretofore mentioned. The question then in this case is not whether it is negligence per se for the plaintiff not to have looked and listened before attempting to cross, but whether it was negligence per se having once looked and listened at a distance of about 50 feet from the track and seeing no train approaching within the distance of 500 or 600 feet, for which distance the view was unobstructed, not to have

continued his vigilance until reaching the track. We are not prepared to so hold. From this statement of facts reasonable men might very well draw different conclusions as to the negligence of the plaintiff, and it is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court. Sans Bois Coal Company *v.* Janeway, 99 Pac. 153, an Oklahoma case not yet officially reported. In all lawsuits, and particularly personal injury cases, a slight difference between the exact facts of cases claimed to be analogous, makes a wide difference in the application of the law of one case to the facts of another. Every case therefore must depend more or less upon its own circumstances. As was said by Earl, J., in Kellogg *v.* N. Y. C. & Hudson R. R. Co., 79 N. Y. 72, where counsel was insisting that that case fell within the rule laid down in a previous opinion by the same court in another case: "It seems to have been supposed at the General Term of the Supreme Court that our decision in the case of Salter *v.* Utica & Black River Railroad Co., 75 N. Y. 273, controls this case. But without taking time to point out the differences between that case and this, it is sufficient to say that the facts of no two cases are alike. There are many circumstances here which did not exist in that case. We have laid down in many cases the principles which are to govern in the decision of this class of cases. These general principles are to be applied to the cases as they arise, and in their application to this case we are constrained to differ from the learned court below."

The line of authorities cited by counsel for defendant in error to the effect that ordinary care in approaching railroad crossings requires the traveler to look and listen in every direction from which danger may be apprehended, are not in point here. Neither are those to the effect that when the physical facts are such that the plaintiff, if he had looked, must have seen the approaching train, the court will disregard the statement that he did look and failed to see. The plaintiff in this case did look and listen, and he saw everything that was in sight on the track between the point from whence he looked and where the view of the track was obstructed by the section house. The question squarely presented by the facts then is, Did the plaintiff, notwithstanding the fact that he looked and listened, fail to approach the crossing with the care and caution of an ordinarily prudent man? And this is generally a question for the jury. Norfolk & Western Railroad Company *v.* Burge, 84 Va. 63, 4 S. E. 21. In Moberly *v.* K. C., St. J. & C. B. R. R. Co., 98 Mo. 183, 11 S. W. 569, the plaintiff approached the crossing, according to his testimony, after 9:00 p. m. It was rather a cold, moonlight night. He approached from the west side. On

that side was a warning signboard, marked "Look out for the Cars." This stood near the Hannibal & St. Joseph Railroad; and was at the base of the incline starting up to the railroad track. The evidence tended to show that this was the most favorable point for a person approaching these crossings to stop and take observations to ascertain whether any train was approaching on either of said roads. In the direction from which defendant's train approached this night, a person standing under the signboard could see it as far as the whistling post or farther, which evidence showed was about 1,000 feet from the crossing. Between that point and the crossing, the railroads made a curve towards the west. The next best point of seeing trains approaching from the south was on the Hannibal & St. Joseph track, and the opportunities for so observing diminished as one went east on account of this curve, and brush, weeds, etc., on the right of way of the tracks. The plaintiff's evidence tended to show that trees, brush, weeds, and vines were so thick that the view was cut off so that one could not see an approaching train from the south on defendant's road for over 250 yards, and perhaps more. He testified that he did stop, just as his wagon stood under the signboard; that he raised his cap from his ears and looked in every direction for approaching trains; that he neither saw nor heard the noise of one; that he took out his watch and saw that it was far past the time when the train on defendant's road was due at that point, he being familiar with the time of its usually passing; and, satisfying himself that the way was clear and safe, he started immediately across.

Upon this statement of facts, which is taken from the report of the case in 17 Mo. App. 518, Mr. Justice Barclay, who delivered the opinion for the Supreme Court, says: "There was a sharp conflict on the issue of plaintiff's negligence. We may summarize the effect of all the evidence in the statement that it was not such as warrants the court in declaring, as matter of law, that plaintiff's negligence contributed to the injury." This case seems to us to be strongly analogous to the case at bar, and the Supreme Court of Missouri refused to hold the plaintiff guilty of contributory negligence as a matter of law.

In another and later Missouri case, it was held that it is not essential for a traveler to look constantly in both directions. Gratiot *v.* Mo. Pac. Ry. Co., 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189.

Another case in point is Greany *v.* Long Island R. R. Co., 101 N. Y. 419, 5 N. E. 425. In that case the accident happened at about 5 o'clock in the afternoon, at Richmond Hill, where the defendant had a station, and by which passed two of its tracks running east and west, intersecting a highway running north and south. The station was at this point and on the

south side of the tracks. The plaintiff lived on the north side of the railroad, and at the time in question was going along the highway to a store situated on the south side of the tracks. As she came to the tracks to cross the railroad, she saw a train coming from the west on the southerly track; it stopped at the station to let off passengers, and its cars covered the highway. She stood still, waiting about five minutes for the train to move ahead, but when she reached the track the train was still standing there and she stopped just as it started. She testified: "As I came to the track I stood and looked both ways, and along the track, and saw no engine" other than that of the train from the west. She took a step or two, and just as she did so, saw a train coming from the east on the north track, but it was so close that she could not make her escape. This occurred in what seemed to her not more than a few seconds after she had looked up and down the track. On cross-examination by the defendant's counsel, she says: "When I stepped on the first track I looked both ways and could see nothing, but a few seconds after that I was struck." "I could see no engine looking either way." She was further questioned by defendant's counsel as follows: "Q. If you had stepped up by the side of that track and looked up the road, you would have seen the train, wouldn't you? She says: "I did look up, and saw it too. It was so close by me that I could not possibly make my escape. If I had looked earlier I would have seen it, but I did not think there was any need of my looking more than once, and I did not think there was any other train due at that time. I had looked a few seconds before and then went right on. When I looked I could see about a quarter of a mile. I did not see any train, and then I walked on toward the track, and the train was right upon me before I noticed it." Danforth, J., who delivered the opinion of the court, in commenting on this evidence, says: "Can it be said under these circumstances that she was bound as a matter of law to see the incoming train? Was it not rather for the jury to say whether or not she had made the effort which a prudent person would make in like circumstances? I think it was for the jury, for it cannot be said to be impossible for a reasonable person to conclude that the accident was caused by the negligent running of the defendant's train, and not by the omission of a duty, or reasonable care on the part of the plaintiff to avoid the collision."

In Rodrian *v.* N. Y., N. H. & H. R. R. Co., 125 N. Y. 526, 26 N. E. 741, a case that adheres strictly to the rule requiring a traveler to look and listen, it was held that: "If in case of an accident at a crossing it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time, when and where looking would

have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making the observation."

In the case of the C. & E. I. R. R. Co. *v.* Hedges, 105 Ind. 398, 7 N. E. 801, it is held that "A person about to cross a railroad track must, to be free from negligence, take such precaution as could reasonably be expected from an ordinarily prudent person under like circumstances; but the fact that he does not, at the instant of stepping upon the track, look to ascertain if a train is approaching, is not conclusive of want of due care on his part."

The foregoing cases sufficiently illustrate the distinction between the case at bar and the cases relied upon by counsel for defendant in error, and it will be observed that in every case where the facts are similar to the admitted facts in the case at bar, the courts have uniformly held that the case should go to the jury upon the question of negligence. When the evidence is conflicting, or when the facts are undisputed, but different minds may reasonably draw different conclusions from them, the question of negligence is always for the jury. Hence, when the question of negligence arises upon a conceded state of facts, if reasonable men might arrive at different conclusions, it must be submitted to the jury.

On the second proposition we are satisfied, as the case now stands, the doctrine of last clear chance or the humanitarian doctrine, as it is called by Mr. White in his work on Personal Injuries on Railroads (section 398), has no application to it. The admitted facts do not bring it within the rule laid down by this court in A., T. & S. F. Ry. Co. *v.* Baker, 21 Okl. 51, 95 Pac. 433. We think the statement of the rule quoted approvingly in Railway Company *v.* Baker, *supra,* from Highland Ave. & B. R. Co. *v.* Sampson, 91 Ala. 560, 8 South. 778, is the correct one, and are constrained to adhere to it in the case at bar. The rule laid down in the Highland Case is to the effect that, "If plaintiff, injured in a collision at a railroad crossing, used due diligence after discovering his peril, he can recover, though he was negligent in not stopping and listening, provided defendant, after seeing the danger failed to use due care." In the case at bar there was no evidence tending to prove that the engineer in charge of defendant's engine discovered the peril of the plaintiff until the accident occurred. The mere fact that the engineer may have seen the plaintiff approaching the track in a covered wagon, would not necessarily put him on his guard as to the peril of the plaintiff. The engineer has the right to presume that a person thus approaching the track has not omitted the ordinary precautions imposed upon him by law, and will stop in time to avoid an injury. But when the

engineer sees the plaintiff approaching the track apparently unconscious of his danger or unable to extricate himself therefrom, the humanitarian doctrine requires the engineer to exercise reasonable care and prudence to avoid injuring him. In other words, he may not, without incuring civil liability, deliberately run down and kill or seriously injure a person so situated, although it may have been shown that his negligence contributed to the injury. This rule of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule it may now be stated to be well established that the injured person, or his representative, may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part, to avoid the injury after discovering the peril of the injured person.

The judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

DUNN, WILLIAMS, HAYES, and TURNER, JJ., concur.

KOREIS *v.* MINNEAPOLIS & ST. L. R. CO.

(Supreme Court of Minnesota, July 23, 1909.)

[122 N. W. Rep. 668.]

Pleading—Master and Servant—Appeal and Error—Injuries to Servant—Complaint—Sufficiency—Assumption of Risk—Contributory Negligence—Negligence—Instructions.—Plaintiff, defendant's engineer, when half way between two stopping places, found that fastenings of the eccentric straps on the engine were defective and the two halves of those straps partially pulled apart. Having made imperfect repairs, he proceeded to the next station for which he had orders, a distance of 19 miles. When the engine was within about half a mile of that station, the left eccentric strap broke, threw back the lever, and broke his arm. It is held:

(1) The complaint was valid as against objections made after the case had been called for trial and plaintiff had introduced some evidence.

(2) A railroad engineer owes a duty to the public, as well as to his employers, and is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting the right of action for injuries resulting from his master's negligence of which he

has knowledge. While the emergency of railroad traffic will not excuse the servant for running the risk of almost certain injury, it is only in extreme cases that he will not be warranted in operating a temporarily repaired engine until he reaches his next station. In view of the circumstances of this case in general, and of the particular fact that the engine in this case ran 18½ out of a possible 19 miles with entire safety, it was a question of fact for the jury whether plaintiff assumed the risk.

(3) Plaintiff was not guilty of contributory negligence as a matter of law.

(4) Defendant's negligence was a question of fact for the jury, because of testimony that the defective condition of the eccentric strap was previously reported to defendant, and that the bolts by which the eccentric straps were attached were old and thread-worn, and because of the occurrence of the accident within a short distance of the place of inspection. Sheedy *v.* Railway Co., 55 Minn. 357, 57 N. W. 60, followed and applied.

(5) It was for the jury to determine whether or not defendant's negligence was the proximate cause of the injury.

(6) That the court charged defendant's duty to have been to furnish plaintiff instrumentalities safe for use is held not to have been reversible error, because the court's attention had not been called to the inaccuracy in language before the jury retired. Waligora *v.* Foundry Co. (Minn.), 119 N. W. 395, followed and applied.

(Syllabus by the Court.)

Appeal from District Court, Waseca County; Thomas S. Buckham, Judge.

Action by Frank A. Koreis against the Minneapolis & St. Louis Railway Company. Verdict for plaintiff. From an order denying its motion for a judgment notwithstanding the verdict or for a new trial, defendant appeals. Affirmed.

John I. Dille and *Peter McGovern* (*Geo. W. Seevers,* of counsel), for appellant.

Albert E. Clark and *D. F. Carmichiel,* for respondent.

JAGGARD, J. Plaintiff and respondent, an engineer in the employ of defendant and appellant railroad company, when half way between two stopping points found that the keys and nuts for the bolts which fastened the left eccentric strap to the eccentric were gone and that the two halves of those straps had pulled partially apart. He repaired the engine by restoring the left eccentric strap to its proper position, putting a nut on the top of the bolt and a wire in the hole made for a key to keep the nut in place. He then proceeded to the station for which he had orders, a distance of 19 miles. When within about a half mile of that station, the left eccentric strap broke, threw back the lever, and broke respondent's arm. The jury

returned a verdict for $3,000 for plaintiff. This appeal was taken from the order overruling appellant's motion in the alternative.

1. Defendant's first point is that the complaint does not state a cause of action. The question before us is not whether that complaint is technically perfect, but whether it is valid as against objections made after the case had been called for trial and plaintiff had introduced some evidence. The pleading charged defendant with negligence, and advised it that the accident was due to an imperfection in "the left go-ahead eccentric" and other parts connected therewith. That defendant was in any wise prejudiced by any inartistic imperfection is not suggested. The assignment of error is without merit.

2. The second point argued by defendant is that "plaintiff acted for the defendant in deciding to repair the engine, made the repairs, and voluntarily used the engine after it had been repaired and assumed the risk." Defendant's rules, of which plaintiff had full knowledge, required the plaintiff to take every precaution for his safety, to resolve all doubts in favor of the safe course, and never to take an unusual risk. Plaintiff was familiar with the relation of the eccentric straps to the lever that caused the injury and the probable consequences of a break in an eccentric strap, the effect of the loosening of the strap upon the eccentric, and the danger of the parts coming off. Plaintiff undertook to repair, and to proceed with the engine as repaired, as part of his employment. He was at perfect liberty to proceed no further when he discovered the break, and to report the accident to the master mechanic, and to await his orders. He had the same freedom in deciding whether he could himself make the repairs and proceed in safety. He was in full possession of all the facts and in absolute authority. The failure to make the engine safe was his failure. Having made the repairs, and having proceeded to use the engine with full knowledge of all facts, and necessarily appreciating all the danger himself, he must be held to have assumed the risk in so doing. This argument by defendant the learned trial judge recognized as the only serious question in the case. In his memorandum he said: "Whether or not an engineer under such circumstances should abandon his journey and report the condition of matters to headquarters for instructions, or should make such temporary repairs as were possible and proceed for the short remainder of his run, was for the engineer in the exercise of his best judgment to determine; and he does not necessarily assume the risks of the journey because he erred in judgment. It is not every defect in his engine discovered by the engineer that would justify him in stalling his train and waiting for repairs from distant headquarters, and whether any particular case required such action must necessarily be left to the good

judgment of the engineer, both on general principles governing the duty of an employee to his master and the special rule of the defendant company given in evidence at the trial. Whether the engineer in this case was required to do one thing or the other was, I think, for the jury to say."

His conclusion was, we are satisfied, correct. Mr. Labatt has thus summarized the authorities: "The case of a railway servant stands upon a special footing, as he is deemed to owe a duty to the public as well as to his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be at all events entitled to remain at work until he obtains an opportunity of notifying the proper agent of the master as to the existence of danger. It is only in very extreme circumstances that he will not be warranted in remaining on a train until it reaches the next station. But the exigencies of railway traffic will not excuse the servant for running the risk of almost certain injury." It would merely incumber the reports to here discuss or to amplify the authorities there cited. That in the case at bar the engineer's course was a reasonably prudent one the jury might have concluded from many facts generally, and from the particular fact that the engine ran 18½ miles out of a possible 19 with entire safety.

The authorities to which defendant calls our attention in this case do not at all control. It is to be borne in mind that at this point defendant is arguing and we are deciding the question of assumption of risk, and not the question of defendant's negligence. In Scott *v.* Eastern Ry. of Minn. (Minn.) 95 N. W. 892, a freight conductor was held guilty of contributory negligence in using a step on a car, which step was in bad order. The defect existed when plaintiff was directed to take the car out. That case is as foreign to the immediate issue as is Nordquist *v.* Railway, 89 Minn. 485, 95 N. W. 322, in which a conductor of a freight train was held guilty of contributory negligence as a matter of law in not complying with the special rule as to conduct of conductors at a mountain tunnel, requiring them to inform the engineers how many cars of air were working. Plaintiff had no personal knowledge that the air was working on 15 cars back of the engine. "Plaintiff did not inform the engineer how many cars of air were working, as the rule required; for he had not informed himself in the premises." The train proceeded, became unmanageable, ran at a dangerous rate of speed through the tunnel to a point below where it left the rails at a curve, was thrown down the mountain side, and plaintiff injured. The other decisions to which we are specially referred in this connection set forth admitted, familiar, but irrelevant, principles. Nor is the case controlled by defendant's authority to the effect

that a servant who is employed to repair machinery, who as a part of his duty handles defective machinery, assumes all risks arising from such defects. That in Kelley *v.* Railway Co., 35 Minn. 490, 29 N. W. 173, a yard brakeman engaged in handling disabled cars assumed the risk of handling such cars is in no wise consistent with the conclusion here reached. Nor does defendant strengthen its position in this case by citing Broderick *v.* Railway Co., 74 Minn. 163, 77 N. W. 28, in which a servant, employed to replace rotten wooden poles with iron poles, placed a ladder against a wooden pole and was injured by jumping off when the pole broke at the ground, or Saxton *v.* Telephone Co., 81 Minn. 314, 84 N. W. 109, in which a servant was injured by a fall from a pole which he had climbed for the purpose of detaching and removing a wire preparatory to taking the pole down.

3. Defendant's third point is that plaintiff was guilty of contributory negligence. We are at a loss to see how possible failure on plaintiff's part to originally inspect the engine has any direct connection as the proximate cause of plaintiff's injury. See Le Duc *v.* Railway Co., 92 Minn. 288-291, 100 N. W. 108. If plaintiff was guilty of contributory negligence at all, it was when he started the engine in motion after he himself had made repairs and necessarily knew the defective condition of the eccentric. The view previously expressed as to his conduct controls, and justified the trial court in trying the question as one of fact.

4. Defendant further insists that the verdict was not justified by the evidence. Here defendant urges that it was not shown to have been negligent. On defendant's statement of facts it would be a serious question whether its conclusion did not follow. The record contains enough to fully justify the trial court in submitting the question to the jury and in sustaining its verdict for the plaintiff. Defendant's own roundhouse foreman testified that the defective condition of the eccentric of the engine in question had been reported by the engineer who had previously brought it in, that entries in the road book had been made with respect thereto, and that certain repairs were thereupon made. Plaintiff discovered that the bolts by which the attachment was made were old and their threads worn. Moreover, the occurrence of the accident within a short distance from the place of inspection was evidence of negligence. Sheedy *v.* Railway Co., 55 Minn. 357, 57 N. W. 60. And see Cederberg *v.* Railway. Co., 101 Minn. 100, 111 N. W. 953. It is so plain that the jury might have properly found the negligence of the defendant to have been the proximate cause of the injury that it would justify no elaboration here.

5. Finally, defendant urges that it was error for the court to have instructed the jury, as it did, that it was defendant's duty to furnish plaintiff instrumentalities that were safe for use. The attention of the court was not called to this matter before the

jury retired. Steinbauer *v.* Stone, 85 Minn. 274, 88 N. W. 754. Within the familiar rule on the subject, this did not constitute reversible error. Waligora *v.* Foundry Co. (Minn.) 119 N. W. 395. It is to be noted that in Kreig *v.* Westinghouse Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. —, Mr. Justice Day uses both formulas. No prejudice appears.

Affirmed.

MAYOR, ETC., OF CITY OF PATERSON *v.* ERIE R. CO.

(Court of Errors and Appeals of New Jersey, Feb. 28, 1910.)

[75 Atl. Rep. 922.]

Municipal Corporations—Imputed Negligence—Negligence of Municipal Agents.—Negligence in the performance of public duties by municipal agents, or instrumentalities, intrusted therewith, is not imputable to the municipality.

Municipal Corporations—Imputed Negligence—Negligence of Municipal Agent.—A fire engine belonging to the city of P. was injured in a collision with a railroad train at a highway crossing. The collision occurred through the joint negligence of the persons operating the train and the driver of the engine. Held, that the negligence of the driver of the engine constituted no bar to the right of the municipality to recover compensation from the railroad company.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the Mayor and Aldermen of the City of Paterson against the Erie Railroad Company. Judgment of nonsuit, and plaintiff brings error. Reversed, and new trial awarded.

Edward F. Merrey, for plaintiff in error.
Collins & Corbin, for defendant in error.

GUMMERE, C. J. This suit was brought by the city of Paterson to recover damages for injuries received by one of its fire engines in a collision between it and a train of the defendant company at a railroad crossing in the city. The plaintiff's proofs showed that the crossing gates were not down, and that no bell was rung, or whistle blown, on the train as it approached the crossing. It also appeared in the plaintiff's case that the driver of the fire engine came onto the crossing without using care to see whether or not a train was approaching. At the close of the plaintiff's case a nonsuit was ordered, upon the ground that its right of recovery was barred by the contributory negligence of the driver of the engine. The plaintiff in error now challenges the soundness of that ruling.

A person whose negligent act produces injury to another cannot escape liability therefor merely by showing that the injury was contributed to by the careless act of a third person. In order to relieve him from such liability, it must also appear that the act of the third person was one for which the injured party was responsible, under the doctrine of "respondeat superior." In the absence of proof of that fact, the injured person is entitled to compel both or either of the wrongdoers to compensate him for his injuries. The correctness of the ruling of the trial court depends, therefore, upon whether the negligence of the driver of the fire engine is imputable to the city.

Municipal corporations are engaged in the performance of public services, in which they have no particular interest, and from which they derive no special benefit in their corporate capacity. The persons employed by them in the rendering of such service act as public servants, charged with a public duty. They are mere agencies, or instrumentalities, by which such duties are performed, and the doctrine of "respondeat superior" does not apply to such employment. Condict *v.* Jersey City, 46 N. J. Law, 157; Wild *v.* Paterson, 47 N. J. Law, 1 Atl. 406, 490. Accordingly it was held by this court in the first of the cited cases that a municipality was not liable for an injury occasioned by the act of a driver of an ash cart, employed by its board of public works to remove ashes and refuse from boxes and barrels placed on the sidewalk, in carelessly making a dump from his cart; and in the second case it was considered by the Supreme Court that a municipality was not responsible to a member of its fire department, who was run over and injured while assisting to haul an engine to a fire, the accident having occurred because the persons in charge of the engine had carelessly permitted its brake to get out of order. Many cases to the same effect, and resting upon the same ground, will be found collated in 20 Am. & Eng. Ency. (2d Ed.) 1205, and in 2 Cyc. 1267, 1304.

The concrete principle established by these decisions is that negligence in the performance of public duties by municipal agents, or instrumentalities, intrusted therewith, is not chargeable against the municipality. Applying this principle to the present case, it is apparent that the ordering of a nonsuit was erroneous; for, unless the negligence of the driver of the fire engine was imputable to the plaintiff, it no more constituted a bar to the plaintiff's right of action against the defendant then the contributing negligent act of any other person, entirely disconnected with the plaintiff, would have done.

The judgment under review will be reversed, and a venire de novo awarded.

JOHNSON *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, March 4, 1910. Headnotes Filed April 11, 1910.)

[51 So. Rep. 851.]

Railroads—Crossing Accidents—Actions—Sufficiency of Declaration.—A declaration for negligent injuries, averring that the railroad company unreasonably detained a freight train with its rear car across the principal street of a village, and that the plaintiff was proceeding cautiously and prudently to pass around said car when the train, without warning, suddenly, swiftly, and violently started backwards upon her, is not ill because of failure to aver the defendant's agents actually saw her in time to prevent the accident.

Railroads—Injury to Persons on Tracks—Trespassers.—One finding the highway blocked an unreasonable time by a train of cars is not a trespasser upon the railroad's property in passing prudently around the end of the train.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Pasco County; J. B. Wall, Judge.

Action by Mary E. Johnson against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

H. S. Hampton and *Dayton & Dayton,* for plaintiff in error. *Sparkman & Carter,* for defendant in error.

COCKRELL, J. The declaration, in an action for personal injuries, to which demurrer was sustained, and judgment final for the defendant was entered, consisted of two counts. In the first count the plaintiff avers that near the station in the town of Blanton she was passing along the frequented highway which crossed defendant's track, and found a car or caboose attached to a train which was negligently permitted to obstruct the highway, and that while cautiously and prudently proceeding around the rear of the car the defendant, without warning, caused the car to be suddenly, swiftly, and violently started backward, striking her and causing injuries. The second count avers a necessity to cross the track, and that the highway was blocked for an unreasonable length of time. From a ruling upon an offer to amend the declaration, it appears that the trial court proceeded upon the theory that the plaintiff was a trespasser and that the company owed no duty to her, except to abstain from willful injury; in other words, that it was not negligent, unless its servants actually saw her in time to prevent the injury. This court has never accepted the doctrine as to trespassers;

on the contrary, it was seriously questioned in Morris *v.* Florida Cent. & P. R. Co., 43 Fla. 10, 29 South. 541. But have we here the case of a trespasser?

It was undoubtedly the common-law rule that a traveler, finding a highway impassable, was permitted to enter upon the abutting land in order to continue his journey, without becoming a trespasser, and we can discover no difference in favor of an abutting owner who by positive act effectively obstructs the highway. The plaintiff does not appear to have gone upon defendant's land more than the necessity demanded, and at most was but a few feet from the public right of way. Even though the plaintiff may have been guilty of some contributory negligence, she is not deprived of her right of action. Florida Cent. & P. R. Co. *v.* Foxworth, 41 Fla. 1, 25 South. 338, 79 Am. St. Rep. 149. And with the statutory presumption of negligence from injury we cannot say as matter of law that the declaration shows that the company exercised "all ordinary and reasonable care and diligence strictly commensurate with the exigencies of the occasion and demanded by the relationship that it bears for the time being to the party in question." Morris *v.* Florida, Cent. & P. R. Co., *supra*. The declaration does not disclose that the railroad company was exercising that ordinary and reasonable care due to the plaintiff.

We get little or no aid from the cases cited from other jurisdictions. They are not exactly on the point. Some hold that it is negligent to attempt to pass over cars or couplings, though there is conflict as to this; and in the Georgia case, Andrews *v.* Central Railroad & Banking Co., 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58, Bleckley, C. J., speaking for the court, suggests that it was the plaintiff's duty to go around the car, as was attempted here.

We think the point practically controlled by the Foxworth and Morris Cases, and the judgment is reversed, with directions to overrule the demurrer. All concur, except TAYLOR, J., absent on account of illness.

HAMILTON *v.* CENTRAL R. OF NEW JERSEY.

(Supreme Court of Pennsylvania, Feb. 14, 1910.)

[75 Atl. Rep. 1058.]

Railroads—Accident at Crossing—Failure to Stop, Look, and Listen.*—Where a traveler stepped on the railroad track at a grade crossing, and was instantly struck by a train which he could have seen if he had looked just before going on the track, there is a legal presumption that he did not stop, look, and listen.

Railroads—Accident at Crossing—Contributory Negligence.†—The evidence showed that, if deceased had stopped at a point six feet from the track, he could have seen an approaching engine in time to have saved himself, but that he walked with his head down, carrying a railroad tie on his shoulder, and was struck by the tender of the engine immediately on stepping on the track. Held, that the railroad company was not liable.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Margaret Hamilton against the Central Railroad of New Jersey. From a judgment for defendant notwithstanding the verdict, plaintiff appeals.

Magill, J., filed an opinion, which was in part as follows:

"The plaintiff's husband, William Hamilton, was killed February 22, 1906, by an engine of the defendant company operated by its engineer and fireman while running south on the tracks of the Baltimore & Ohio Railroad near South street in the city of Philadelphia. The deceased was, and had been for three months, employed by the Black Diamond Coal Company. The yard of this company fronts upon the Schuylkill river north of South street bridge and is intersected by the tracks of the Baltimore & Ohio Railroad Company, part of the coal company's yard being on the westerly or river side and another part on the easterly side of the railroad tracks. From the part of the yard on the river side to the part on the easterly side of the tracks a crossing was constructed by planking between the rails. This crossing is about 10 feet in width, and crosses the tracks diagonally in a northeasterly and southwesterly direction. At the point of the accident there are four tracks; the easterly and westerly

*See last foot-note of White *v.* New York, etc., R. Co. (Mass.), 31 R. R. R. 488, 54 Am. & Eng. R. Cas., N. S., 488; seventh head-note of Fleenor *v.* Oregon Short Line R. Co. (Idaho), 34 R. R. R. 513, 57 Am. & Eng. R. Cas., N. S., 513.

†See second head-note of Slattery *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795; last foot-note of Popke *v.* New York, etc., Co. (Conn.), 34 R. R. R. 375, 57 Am. & Eng. R. Cas., N. S., 375; last paragraph of third foot-note of Lundergan *v.* New York Cent. R. (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

tracks being sidings and used for freight purposes, while the two intermediate tracks are used for the general traffic of the road. The distance between the rails of each track is 4 feet, 8½ inches; while the distance between the tracks, measured parallel with the crossing, is 8 feet, and measured along the crossing, at right angles to the rails, this distance is 7 feet, 3 inches.

"The yard of the Black Diamond Coal Company on the westerly side of the track is inclosed by a board fence with a gate opening opposite the crossing at a distance of 25½ feet from the westernmost rail of the westerly track. At the time of the accident, shortly after midday of February 22, 1906, the weather was clear and bright. William Hamilton was engaged in carrying railroad ties from the westermost part of the coal company's yard across the railroad tracks to that portion of the yard on the easterly side. These ties he carried upon his shoulder, one at a time, and had safely crossed the tracks and deposited two or three ties in the yard on the easterly side before the accident. When the accident occurred, he had passed from the yard of the coal company on the westerly side of the track with a tie (on his right shoulder, according to the plaintiff's witness, and on his left shoulder, according to the defendant's witnesses), the end of which protruded for about two feet in front of him. He had walked across the westerly or side track, across the intervening space between it and the south-bound track, and, when just about to step upon the south-bound track, he was struck by the corner of the tender of defendant's engine then running backward in a southerly direction. Whether the tender struck his body or head, or whether it struck only the tie which in turn struck Hamilton, is not entirely clear under the evidence. From the contact with the engine, however, he was thrown a distance of some 20 to 30 feet and injured in such a way that he died shortly afterwards. * * *

"The evidence in this case clearly demonstrates that the proper place to have stopped, looked, and listened for an approaching train was on emerging from between the freight cars standing upon the siding, which were known or must have been known to the deceased to have been idle cars in no danger of moving. If he had stopped, as he could well and safely have stopped, at a point 5½ feet west of the track on which the engine approached, after crossing the siding, he would have had an unobstructed view of the track for a distance of 1,870 feet. Had he stopped at a point 6 feet back from the track on which the engine approached, he would have had a view of the track for a distance of 392 feet and at a distance of 7 feet back from this track he would have had a view of 92 feet. At any one of these points the deceased could have stopped with perfect safety to himself. The evidence all goes to indicate that, until he approached within a distance of 8 feet of the track, his view of the approaching en-

gine would have been for a distance of less than 95 feet. The testimony of plaintiff's witness Ross clearly shows that Hamilton did not stop after emerging from between the freight cars and coming within his line of vision, but that he walked forward until the tender of the engine struck him or the tie which he was carrying upon his shoulder.

"The evidence of the defendant's witnesses Divine and Ward, also shows conclusively that from the time Hamilton emerged from the coal company's yard on the westerly side of the railroad, a distance of 25 feet from the track on which he was struck, he did not stop, but walked forward with his head down, with a tie on his left stoulder, and apparently without looking to the left or to the right, until going upon or about to step upon the south-bound track, where he was struck and killed. It is therefore evident that the deceased did that which an ordinarily prudent man would not have done, that he did not exercise ordinary care under the circumstances. He had been working at this place for months, and was thoroughly familiar with the surroundings and conditions there existing. It was clearly his duty to have stopped before reaching the south-bound track at a point where he could have had a view of the approaching train, and could have heard it had he listened, and this he could safely have done either upon the side track or at a point between the two tracks where he could have stopped in perfect safety. That he did not do so is clear, not only from the evidence, but from the fact that he was struck by the tender of the engine either before or immediately after stepping upon the track. The case in its facts nearly approaches Keppleman *v.* Phila. & Reading Railway Co., 190 Pa. 333, 42 Atl. 697, in which it was said: 'It must be very obvious that the proper time and place for the plaintiff to have stopped and looked was just when he emerged from the opening in the standing coal train and before stepping on the north track. He would then have had a view of the train for a considerable distance in the direction from which the engine came. His unfortunate mistake was in not looking then. In answer to the question whether if he had stopped and looked before stepping on the north track he could have avoided the collision he truthfully answered in the affirmative.' In this case the testimony of Ross, plaintiff's witness, as well as the testimony of defendant's witnesses, shows conclusively that, if Hamilton had stopped and looked before stepping on the south-bound track, he could have avoided the collision.

"In Sullivan *v.* Railroad Co., 175 Pa. 361, 34 Atl. 798, it is said by Mr. Justice Fell: 'The presumption that deceased performed his duty is based upon the fact that the natural instincts of men lead them to avoid injury. It prevails in the absence of direct testimony upon the subject, but it may be rebutted by proof of facts and circumstances, as well as by direct evidence. It is demonstrated by the testimony that, if he obeyed the legal injunc-

tion, he saw and heard the approaching train; and the only deduction possible is that he did not look and listen, or that, seeing and hearing, he went on regardless of the danger'—citing Myers *v.* B. & O. Railroad Co., 150 Pa. 386, 24 Atl. 747, in which it is said. 'One who is struck by a moving train which is plainly visible from the point he occupied when it became his duty to stop, look, and listen must be conclusively presumed to have disregarded that rule of law and of common prudence and to have gone negligently into an obvious danger.' And in Urias *v.* Penna. R. R. Co., 152 Pa. 326, 25 Atl. 566, it was said by Chief Justice Paxson: 'If a person in approaching a track could have had an unobstructed view of the track for 1,950 feet at a point 18 feet from the track, and he goes upon the track and is injured, it is vain for him to say that he stopped, looked, and listened at the point of unobstructed view.' And in Beach *v.* Penna. R. R. Co., 212 Pa. 567, 61 Atl. 1106, it is said by Mr. Justice Feli: 'It has been said repeatedly that one who goes on a railroad track immediately in front of a moving train which he saw or could have seen if he had looked at the proper place will be presumed to have been negligent is in its nature applicable only to clear cases, where the facts and the inferences to be drawn from them are free from doubt, and the conclusion of negligence is irresistible. McNeal *v.* Pittsburg, etc., Ry. Co., 131 Pa. 184 [18 Atl. 1026]; Muckinhaupt *v.* Erie Railroad Co., 196 Pa. 213 [46 Atl. 364].'

"Again, in Howard *v.* Baltimore & Ohio R. R. Co., 219 Pa. 358, 68 Atl. 848, it is said by Mr. Justice Potter: 'We have said many times that the rule set forth in Carroll *v.* Railroad Company, 12 Wkly. Notes Cas. 348, is only applicable to clear cases. It applies only where a person enters upon a railroad track and is struck by a moving train so instantaneously as to raise a legal presumption that he did not stop, look, and listen, and to rebut any presumption that he had done so. Where there is doubt as to negligence on the part of the plaintiff, the case is for the jury.' And in Lonzer *v.* Lehigh Valley R. R. Co., 196 Pa. 610, 46 Atl. 937, it is said: 'When testimony offered by defendant is of a nature to defeat the plaintiff's claim, is not in itself improbable, is not at variance with any proved or admitted facts or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief, and, if they do so, it is the duty of the court to set the verdict aside. Where the proof is of such a character, the court may refuse to submit it at all and direct a verdict for the defendant.'

"We are of the opinion that the presumption of the performance of duty by the deceased in this case has been fully rebutted by proof of facts and circumstances as well as by direct evidence, and that it has been demonstrated by the testimony that, if Ham-

ilton had obeyed the legal injunction to stop, look, and listen before going upon or approaching the track, he would have seen the approaching train, and that the only deduction possible is that he did not look or listen, or, that seeing and hearing, he went on regardless of the danger, as was said in Sullivan *v.* Railroad Co., 175 Pa. 361, 34 Atl. 798, and that this case comes within the rule as reiterated in Howard *v.* Baltimore & Ohio R. R. Co., 219 Pa. 358, 68 Atl. 848, that, the deceased having entered upon a railroad track and having instantaneously been struck by a moving train, a legal presumption is raised that he did not stop, look, and listen, which rebuts any presumption of the contributory negligence on the part of William Hamilton, husband of the plaintiff. Having arrived at this conclusion, it becomes unnecessary for us to consider the question of negligence on the part of the defendant, or the question of whether the defendant or the Baltimore & Ohio Railroad Company would be liable, if either.

"The motion of the defendant is therefore granted, and judgment is now entered for the defendant non obstante veredicto."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Charles Biddle and *C. Bradford Fraley,* for appellant.
Arthur G. Dickson, for appellee.

PER CURIAM. The facts of the case and the law applicable thereto are very fully and clearly stated in the opinion of the learned trial judge, and the judgment is affirmed for the reasons given by him.

CHICAGO, M. & ST. P. RY. CO. *v.* WESTBY.

(Circuit Court of Appeals, Eighth Circuit, April 12, 1910.)

[178 Fed. Rep. 619.]

Constitutional Law—Equal Protection of Laws—Requisites of Constitutional Classification—Employer's Liability Law.—The employer's liability law of South Dakota (Laws 1907, c. 219) excepts from the general law of the state all common carriers and all their employees, subjects the former to and grants to the latter causes of action for injuries to the employees caused by the negligence of their fellow servants and for those to which their own negligence contributes, while no such liabilities are imposed upon other employers and no such rights are granted to other employees. The fourteenth amendment to the Constitution forbids any state to "deny to any person the equal protection of the laws." Held:

(1) Legislatures of states for some sound reason of necessity or propriety inherent in the subjects of their legislation may classify those subjects and make laws applicable to one class that are inapplicable to another, but may not make such classifications arbitrarily.

(2) There are three indispensable conditions to a constitutional imposition by a state of liabilities or burdens upon and to a constitutional grant by a state of rights or privileges to the members of a class that other members of the state may not hear or enjoy:

(a) There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of all other members of the state in relation to the subjects of the discriminatory legislation as presents a just, natural reason for the difference made in their liabilities and burdens and in their rights and privileges.

(b) No one who does not belong to the class may be included therein, and all the members of the class must be treated alike.

(c) All who are in a situation and circumstances relative to the subjects of the discriminatory legislation indistinguishable from those of the members of the class must be brought under the influence of the law and treated by it in the same way as are the members of the class.

(3) The employer's liability law of South Dakota fulfills neither of these conditions and is violative of the prohibition of unequal laws contained in the fourteenth amendment because there is no sound reason of necessity or propriety for the difference of liabilities and rights it makes between the masters and servants in the class it forms and other masters and servants in the state in the same situation and circumstances relative to its subject-matter as the members of the class, and because it does not subject to its provisions all masters and servants who are in the same situation and circumstances relative to its subject-matter as the members of the class it forms.

Constitutional Law—Determination of Constitutional Questions—Construction of Statutes—Employer's Liability Law.—The employer's liability act of South Dakota, which by its terms subjects every common carrier engaged in commerce in the state to liability for, and grants to every employee of every such carrier a cause of action for, injuries to the employee caused by the negligence of a fellow servant and for those contributed to by his own negligence, may not be limited by construction to a constitutional class, to common carriers using the agency of steam or other powerful agency and operating engines, trains, or other ponderous machinery and their servants engaged in hazardous and dangerous occupations and then sustained.

Statutes—Partial Invalidity.—Where a part of a statute is constitutional and a part is unconstitutional, the former may be sustained in proper cases, while the latter fails.

Indispensable conditions of such a result, however, are that: (a) The constitutional part and the unconstitutional part are capable of separation so that each part may be read and may stand by itself, (b) the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the Legislature in enacting the law, (c) the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former alone.

Constitutional Law—Judicial Legislation—Construction of Statutes—Presumption from General Language.—Where the Legislature of a state has included in a law by general language numerous subjects or persons and has made no limitation or exception, the legal presumption is that it intended to make none, and it would be judicial legislation for a court to do so.

Constitutional Law—Exceptions to General Language Inadmissible to Make Classification Constitutional.—A statute of a state which includes by general language in a single class those within and those without the constitutional class may not be limited by judicial construction to the latter class and then sustained.

(Syllabus by the Court.)

In error to the Circuit Court of the United States for the District of South Dakota.

Action by Marie M. Westby, administratrix of Martin Westby, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William G. Porter (*Charles E. Vroman,* on the brief), for plaintiff in error.

A. B. Kittredge (*Hans Urdahl* and *Edwin R. Winans,* on the brief), for defendant in error.

Before Sanborn, Circuit Judge, and Riner and William H. Munger, District Judges.

SANBORN, Circuit Judge. At about 9 o'clock in the morning on a bright day in December, as Martin Westby, a section foreman, was walking west on the northerly track of the Chicago, Milwaukee & St. Paul Railway Company at Madison, in South Dakota, one of its passenger trains, which was backing from the station in order to change engines, overtook and struck him. The plaintiff below was the widow and administratrix of his estate, and she brought this action and recovered a judgment for the benefit of herself and their minor children under the employer's liability act of February 20, 1907 (chapter 219 of the Session Laws of South Dakota for 1907), which provides:

"Section 1. That every common carrier engaged in trade or commerce in the State of South Dakota shall be liable to any of its employès, or in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents or employès, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

"Sec. 2. That in all actions hereafter brought against any common carrier to recover damages for personal injuries to an employè, or where such injuries have resulted in his death, the fact that the employè may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was less than the negligence of the employer, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employè. All questions of negligence and contributory negligence shall be for the jury."

There are many specifications of alleged error in this case which involve grave questions of law; but the face of the record discloses an error which was probably inadvertently made, but from which there seems to be no escape. It is that the court struck out the testimony of Mr. Miller, a witness for the defendant and the conductor of the train that struck Westby, upon the issue whether or not that train was executing a switching movement when the accident happened. The materiality and importance of this testimony will appear from a brief statement of the pleadings, the course of the trial, and the charge of the court relative to this issue.

The administratrix alleged in her complaint, among other things, that Mr. Westby was one of the section foremen and yardmasters of the defendant, that he knew its rules, that rule 60 was that "when a train is pushed by an engine, except when switching and making up trains in yards, a trainman must be stationed on the front of the leading car with proper signals so as to perceive the first sign of danger and immediately signal the engineer," that it had always been the custom at Madison

to obey this and other rules, that Westby relied upon this rule and the custom of obeying it, and while he was engaged in the discharge of his duty as section foreman the defendant backed the passenger train upon him without any trainman upon the leading car and struck him. The defendant in its answer denied all negligence on its part, and among other things denied that it had been the custom of its employès at Madison to obey rule 60, and that Mr. Westby relied upon the rule or upon any such custom, and averred that the rule was inapplicable to the train which struck him because it was switching, and that he was guilty of negligence which directly contributed to his death. These facts were disclosed by the trial. The accident happened in the railroad yard at Madison where there were many railroad tracks. Among these were two called the "Bristol-Madison track," and the "Wessington Springs-Madison track," which extended east and west, parallel to each other and about 14 feet apart from center to center, from a point about 600 feet east of Union avenue to a point several hundred feet west of that avenue. Union avenue crossed these tracks at right angles. One hundred and thirty-three feet west of it and on the north side of the tracks was a toolhouse, and about 1,300 feet east of it was the depot. The Bristol-Madison track was the northerly track, and there was a switch about 600 feet east of Union avenue over which passenger trains coming from the west on the Bristol-Madison track passed on to the Wessington Springs-Madison track to reach the depot.

Two passenger trains going east, one from Bristol on the Bristol-Madison track and one from Wessington Springs on the Wessington Springs-Madison track, were due at Madison about the time of the accident, and the Bristol-Madison train changed engines there. When that train arrived, the Wessington Springs train had not come in, and the Bristol train stopped about 30 feet west of Union avenue, and Westby, who, with two sectionmen, was at work on a switch just south of the Wessington Springs track, talked with some of its crew. The Bristol train then went on across the switch upon the Wessington Springs track and to the station, delivered its passengers and baggage, and then backed up across the switch again onto its own track and across Union avenue in order to change its engine. When it passed over the switch, the conductor and the brakeman got off the rear end of the train to attend to the switch and the train respectively and left no one there. The train backed slowly up along its own track. The Wessington Springs train was then coming in from the west, and as the rear of the Bristol train backed up over Union avenue Westby had left his work just south of the Wessington Springs track, had crossed that track, and was walking along on the Bristol track toward the toolhouse in order to get some plugs. As he walked along this track, the

rear of the Bristol train overtook and knocked him down. If there had been a trainman on the rear of the train, it is probable that he would have seen Westby, would have given him a signal, and would have saved him; but there was no one on the rear of the train at the time of the accident. If Mr. Westby had looked to the east along the north track, which was free from all obstructions, either when he went upon it or while he was walking along it, it is probable that he would have seen the train backing towards him, and that he would have saved himself. Testimony was introduced before the jury that the fatal movement of the Bristol train was, and that it was not, a switching movement, and the court instructed the jury that:

"In determining whether the employees in charge of the train were negligent you will consider the evidence of the witnesses as to whether this train movement that resulted in the death of Westby came within rule 60, or whether it was a switching movement so as to exclude it from that."

Mr. Miller, the conductor of the Bristol train, testified upon this issue without objection on Saturday afternoon, April 26, 1909, as follows:

"Q. Take this movement from the time you moved back, gave the signal to move back to change that engine and to get out of the way of the other train, up to the time you returned to the station again, what was the character of that movement? A. It would be switching. We could not call it anything else.

"Q. How many classes of movements are there of trains and cars? A. Two.

"Q What are they? A. One would be switching and the other would be leaving a station.

"Q. What would you call the latter? A. Road movement.

"Q. Train line movement? A. Yes, sir.

"Q. Traffic movement? A. Yes, sir.

"Q. You may state whether or not the movement of cars and trains fall in one or the other of these classes. A. Yes, it would be either switching or otherwise.

"Q. Either switching or train line movement? A. Making preparation for completing the train would be switching, putting it together ready for the engine.

"Q. How many switches do you go through to get back to the point where you took off the engine to put on another? A. Two.

"Q. And in returning how many? A. The same two."

On the following Monday after Mr. Peterson had testified that he was, and for five years had been, trainmaster of the Iowa & Dakota division of the defendant's railroad, and that the movement of this train was a switching movement, he was asked what he knew "in regard to the custom as to the observance of rule 60 where trains are being switched as to a party being put on the rear car." Thereupon the court sustained the objection

of the plaintiff below that the question was incompetent, irrelevant, and immaterial, and granted her motion "that the testimony of the witness Miller given on Saturday afternoon be stricken out because it is incompetent, irrelevant, and immaterial." As the issue whether or not the movement of the train at the time of the accident was switching and was, therefore, excepted from rule 60, was made by the pleadings, tried by the evidence, and was so material that it was submitted to the jury by the court, there is no escape from the conclusion that it was an error of law to withdraw from the jury the testimony of the conductor upon this issue.

Counsel for the plaintiff called attention to the fact that Miller also testified that it was not customary in moving trains backward, as the Bristol train was moved at the time of the accident, to place a trainman or any one on the rear car for the purpose of warning trackmen or sectionmen working around the yards, and they argue that the question to Peterson, which was asked just before the motion to strike out Miller's testimony was made, was directed to this issue, and that it was the portion of Miller's testimony directed to this issue, and that alone, that was stricken out. It may be that in the thought of counsel and court at the time this motion was made this was the purpose and extent of the motion and of the ruling. But the question before us is not now what counsel and court thought about it, but what the motion and the ruling meant to the jury. The pleadings, the evidence, and the charge have been read again in view of the contention of counsel upon this subject without finding any safe ground for holding either that the jury were told, or that they understood, that the motion granted did not withdraw from their consideration just what it stated, and that was the testimony of "Miller given on Saturday afternoon," and that testimony was all the testimony he gave in the case. When an attempt is made to limit the motion to part of his testimony, the question at once arises to what part, and there is nothing in the record which answers it. Moreover, the question asked Peterson just before the motion was made was not directed, as is the part of Miller's testimony to which this court is asked to limit the motion, to the custom "for the purpose of warning trackmen or sectionmen working around the yards," but it called for the general custom where trains were being switched, as he had testified that this train was, regardless of the purpose of the custom. Our reluctant conclusion is that the record forbids a limitation of this motion, and that the jury must have understood it to mean what counsel said when he made it and that the ruling upon it necessitates another trial of this action.

The court below overruled objections made at the trial of this case and to the charge of the court on the ground that the employer's liability law of South Dakota was unconstitutional.

Prior to the act of February 20, 1907, employers in South Dakota were not liable for injuries or deaths of their employees which the latter's negligence contributed to cause nor for those caused by the negligence of their fellow servants, and this is still the general law of that state. That statute of 1907 excepted from this general law, which still governs the rights of all other masters and servants in that state, common carriers and their servants, subjected the former to, and granted to the latter, causes of action for injuries to the servants caused by the negligence of their fellow servants and for injuries to which their own negligence contributed, while no such liabilities were imposed upon other employers and no such rights were granted to other servants. The fourteenth amendment to the Constitution of the United States forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." How may such legislation escape this inhibition? The answer is, by classification, and the concession is freely made that the Legislatures of the states may lawfully classify the subjects of their laws and make provisions applicable to one class of subjects that have no application to another class. But the members of these classes may not be selected arbitrarily without just or sound reason inherent in their respective situations and circumstances relative to the subject-matter of the legislation for the difference in the burdens imposed and the privileges conferred upon them by such a discriminatory law.

In the face of the constitutional prohibition of unequal laws, there are three indispensable conditions to a constitutional imposition of liabilities or burdens upon, or a constitutional grant of rights or privileges to, the members of one class that other members of the state do not bear or enjoy: (1) There must be such a difference between the situation and circumstances of all the members of the class and the situation and circumstances of other members of the state in relation to the subjects of the discriminatory legislation as presents a just and natural reason of necessity or propriety for the difference made by the law in their liabilities and rights. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. Gulf, Colorado & Santa Fee Ry. Co. *v.* Ellis, 165 U. S. 150, 155, 165, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 107-112, 22 Sup. Ct. 30, 46 L. Ed. 92; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 559, 22 Sup. Ct. 431, 46 L. Ed. 679; Southern Ry. Co. *v.* Greene, 216 U. S. 400, 30 Sup. Ct.

287, 54 L. Ed. — (filed February 21, 1910); Nichols *v.* Walter, 37 Minn. 264, 33 N. W. 800; Lavallee *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 40 Minn. 249, 252, 41 N. W. 974; State *v.* Loomis, 115 Mo. 307, 314, 22 S. W. 350, 21 L. R. A. 789; Ballard *v.* Mississippi Cotton Oil Co., 81 Miss. 507, 34 South. 533, 549, 62 L. R. A. 407, 95 Am. St. Rep. 476. (2) No person who does not belong to the class may be included therein, and all persons within the influence of the legislation relative to the class must be treated alike thereby. (3) All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class.

"An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act. And it must include none who do not belong to the class." Sams *v.* St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686, 691, 61 L. R. A. 475; Johnson *v.* St. Paul & Duluth R. Co., 43 Minn. 222, 224, 45 N. W. 156, 8 L. R. A. 419; Lodi Township *v.* State, 51 N. J. Law, 402, 18 Atl. 749, 6 L. R. A. 56.

It is evident from a casual reading of the three conditions which have been stated that, if either of them be disregarded, parties within or without the legislative class must be deprived of the equal protection of the laws, and the question at once arises: Does this statute of South Dakota comply with these conditions?

The subject-matter of the statute is the liability of masters for injuries to their servants caused by the negligence of their fellow servants and for those to which their own negligence contributes. There is a sound and natural reason why railroad companies should be liable, while other employers are not, for the injuries of their servants engaged in the operation of their engines and trains and in the construction and repair of tracks and roadbeds on which engines and trains are in operation and in any other like hazardous occupations, although those injuries are incurred by the negligence of fellow servants. It is that the occupation of these servants is more hazardous and more dangerous than that of servants in ordinary occupations, and that the fellow servants on whose care their safety largely depends are so numerous and many of them are so distant from them in place or in work that they have little, if any, opportunity to learn their characters for care and prudence. If the act under consideration limited its beneficiaries to servants of this class, it might escape the ban of the Constitution and be sustained. But it confers its causes of action upon all the servants of all com-

mon carriers, whether these servants are engaged in dangerous or in comparatively safe occupations, whether they are driving engines, operating trains, and repairing railroad tracks, or making tariffs, keeping books, trying lawsuits, conducting or driving street cars, or stagecoaches, or cabs, or omnibuses, or wagons, loading and unloading drays or trucks, or operating a telegraph or a telephone or an express business, so that the danger of their occupations utterly fails to distinguish their situation and circumstances from those of the servants of other masters some of whom, like servants in this legislative class, have dangerous and others comparatively safe occupations.

All who pursue the business of carrying passengers or goods or information for hire for the public generally, railroad companies, express companies, telegraph companies, telephone companies, street car companies, owners and operators of omnibuses, cabs, carriages, carts, drays, trucks, sleds, boats, and many other vehicles, are common carriers. Hutchinson on Carriers (2d Ed.) §§ 58-69; Employers' Liability Cases, 207 U. S. 463, 497, 28 Sup. Ct. 141, 52 L. Ed. 297. A little reflection upon the vast amount of transportation conducted by common carriers in taking passengers and goods to and from railroads and vessels and in carrying them through parts of the country which the railroads do not reach makes the fact apparent that railroad companies constitute but a small percentage of the number of common carriers, and convinces that a large proportion and probably a large majority of all the servants of all common carriers are not engaged in any dangerous occupation whatever. Under this statute, if a book-keeper or any other servant of a common carrier who is engaged in the performance of clerical duties in its general offices, and such a servant of a merchant or manufacturer engaged in the same occupation under the same circumstances, are each injured by the negligence of a fellow servant, the common carrier is liable for the damages his servant sustained, while the merchant or manfacturer is exempt from any liability for the damages which his employee suffered. A girl working for a telephone company may recover from it the damages she sustains through the negligence of her fellow servant which her own negligence contributed to cause; but a girl operating a telephone for a hotel keeper or a merchant and discharging the same duties under the same circumstances has no remedy for her injuries. A common carrier is liable for the injuries of his servant engaged in loading, unloading, or driving a dray, a wagon, or a truck caused by the negligence of his fellow servant; but a merchant or a manufacturer, or any other person, is exempt from liability for such injuries to his servants engaged in doing the same work under the same circumstances. A telegraph operator employed by a telegraph company may recover of his master for injuries caused by the negligence of

his fellow servant which his own negligence contributed to cause; but a telegraph operator employed by a bank or a commission company to discharge the same duties under the same circumstances can recover nothing for such injuries.

Illustrations might be multiplied indefinitely; but these seem to be ample to show that this statute denies the equal protection of the law to persons in the same situations and circumstances relative to the subject-matter of this legislation. There is no reason of necessity or propriety—there is no reason whatever that occurs to us—why a common carrier should be subjected to liability to his bookkeeper or to his clerk in his general offices, or to his driver or loader of his dray or truck or to any other of his servants who is not actually engaged in some such hazardous occupation as operating engines or trains, or handling or working about machinery, while the merchant, the manufacturer, and all other persons are exempt from such liabilities to their servants engaged in the performance of the same work under the same circumstances. And there is no just reason—nay there is no reason whatever that we can ascertain—why such servants of common carriers who are not engaged in any dangerous or hazardous occupation should be granted the right and privilege of recoveries from their masters for damages caused by the negligence of their fellow servants which their own negligence contributed to cause while the servants of other persons doing the same work in the same situation and circumstances are denied this right and privilege. The discrimination which this statute works violates the indispensable conditions of a constitutional classification. There is no difference between the situation and circumstances of all the members of the class which the statute forms and those of all other masters and servants in the state relative to the subject-matter of this legislation that presents any natural or sound or just reason of necessity or propriety for the difference in their liabilities and rights it attempts to make, and it does not bring under its influence all masters and servants who are in a situation and in circumstances relative to its subject-matter indistinguishable from those of members of the class. All employees of those who are not common carriers who are engaged under similar circumstances in the same or similar occupations to those of the employees of common carriers that are not engaged in dangerous occupations are entitled to the same rights of action and to the same privileges that are granted to such servants of common carriers, and the denial of them by this statute is a denial of the equal protection of the laws. And all common carriers are entitled to the same exemptions from liability to their employees who are not engaged in any dangerous occupation for injuries caused by the negligence of their fellow servants which their own negligence contributed to cause that other employers enjoy. The statute

deprives them of this exemption and thereby denies to them the equal protection of the laws. Because there is no sound reason of necessity or propriety for the difference of liabilities and rights which this law makes between the members of the class it forms and the other masters and servants in the state in the same situation and circumstances as members of the class, and because it does not include and subject to its provisions all masters and servants in the state who are in the same situation and circumstances relative to the subject-matter of the legislation as are members of the class it forms, the conclusion has been irresistibly forced upon our minds that this statute denies to many citizens the equal protection of the laws and violates the fourteenth amendment to the Constitution.

Perhaps the most learned and exhaustive opinion upon this question is that of Chief Justice Whitfield in Ballard *v.* Mississippi Cotton Oil Co., 81 Miss. 507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476. Support for the conclusion which has been reached may be found in that opinion and in Gulf, Colorado & Santa Fee Ry. Co. *v.* Ellis, 165 U. S. 150, 155, 165, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 107-112, 22 Sup. Ct. 30, 46 L. Ed. 92; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 559, 560, 22 Sup. Ct. 431, 46 L. Ed. 679; Southern Ry. Co. *v.* Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. ——, filed February 21, 1910; Lavallee *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 40 Minn. 249, 251, 41 N. W. 974; Indianapolis Traction & Terminal Co. *v.* Kinney, 171 Ind. 612, 85 N. E. 954, 956, 957, 23 L. R. A. (N. S.) 711; Bedford Quarries Co. *v.* Bough, 168 Ind. 671, 674, 80 N. E. 529, 533, 14 L. R. A. (N. S.) 418; Sams *v.* St. Louis & M. R. Co., 174 Mo. 53, 73 S. W. 686, 689, 691, 61 L. R. A. 475; State *v.* Loomis, 115 Mo. 307, 314, 22 S. W. 350, 21 L. R. A. 789; Johnson *v.* St. Paul & Duluth R. R. Co., 43 Minn. 222, 223, 45 N. W. 156, 8 L. R. A. 419; Indianapolis Union Ry. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 945, 946, 54 L. R. A. 787; Deppe *v.* Chicago, Rock Island & Pacific Ry. Co., 36 Iowa, 52; Missouri Pacific Ry. Co. *v.* Haley, 25 Kan. 26, 35; Union Pacific Ry. Co. *v.* Harris, 33 Kan. 416, 6 Pac. 571. Counsel for the defendant in error have called attention to, and we have considered, the facts that the national employer's liability act of June 11, 1906 (34 Stat. 232, c. 3073 [U. S. Comp. St. Supp. 1907, pp. 891, 892, Supp. 1909, p. 1148]), creates a class that includes every common carrier engaged in commerce among the states and in the territories and in the District of Columbia, that it was sustained so far as it related to the territories and the District of Columbia in El Paso & N. E. Ry. Co. *v.* Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. ——, and that in Employers' Liability Cases, 207 U. S. 463, 492, 28 Sup. Ct. 141, 52 L. Ed. 297, the Supreme

Court dismissed the criticism that this law placed all common carriers in a disfavored and all its employees in a favored class with the remark that this consideration concerned the expediency of the act, not the power of Congress to enact it. But the prohibition of the fourteenth amendment was not directed against and did not limit or affect the power of Congress. Its command is "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws," and the cases in which the national employer's liability acts have been considered involved and hence decided no question of the violation of that amendment. It is, however, significant that when the Congress came to pass act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), in lieu of that of 1906, which had been held unconstitutional so far as it related to commerce among the states, it restricted the class formed by that act to "every common carrier by railroad" engaging in interstate or other specified commerce and their employees. In the cases of Missouri Pacific Railway Co. *v.* Mackey, 127 U. S. 205, 210, 8 Sup. Ct. 1161, 32 L. Ed. 107, and Missouri Pacific Railway Co. *v.* Castle, 97 C. C. A. 124, 172 Fed. 841, cited by counsel for the plaintiff in error, the statutes under consideration limited the classes they formed to railway companies and their employees and did not attempt to include in them all common carriers and their servants, the remark of Mr. Justice Field in the former case that it was "simply a question or legislative discretion whether the same liabilities should be applied to carriers by canal and stage coaches and to persons and to corporations using steam in manufactories" was obiter dictum is not broad enough in its terms to cover all common carriers and is not in accord with the later considered decisions of the Supreme Court in the Ellis' Case, 165 U. S. 150, 165, 17 Sup. Ct. 255, 41 L. Ed. 666, and the Greene Case, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. —— (filed February 21, 1910), that:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

The most searching investigation and deliberate reflection have disclosed no such reasonable ground for, no difference between those within and those without, the class formed by this South Dakota statute which bears any just or proper relation to the classification attempted by it, and, tested by this rule of the Supreme Court, it cannot be sustained.

Nor can his statute lawfully be limited by construction either in its terms or in its effect to railroad companies or to common carriers and their employees engaged in dangerous occupations, and be thus brought out from under the ban of the Constitution and sustained. That if the act had been thus restricted by the Legislature that passed it it might not have been violative of the fourteenth amendment may be conceded, but is not decided. It is also true that where a statute is constitutional in part and unconstitutional in part, the former part in proper cases may be sustained, while the latter part fails. But indispensable conditions of such a result are: (1) That the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself (Baldwin *v.* Franks, 120 U. S. 679, 685, 7 Sup. Ct. 656, 763, 30 L. Ed. 766); (2) that the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if it is stricken out, to give effect to the apparent intention of the Legislature in enacting it; and (3) that the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only. Allen *v.* Louisiana, 103 U. S. 80, 84, 26 L. Ed. 318; United States *v.* Reese, 92 U. S. 214, 218, 221, 23 L. Ed. 563; The Trade-Mark Cases, 100 U. S. 82, 99, 25 L. Ed. 550; United States *v.* Harris, 106 U. S. 629, 641, 642, 1 Sup. Ct. 601, 27 L. Ed. 290; Virginia Coupon Cases (Poindexter *v.* Greenhow) 114 U. S. 270, 305, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Spraigue *v.* Thompson, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115; Income Tax Cases (Pollock *v.* Farmers' Loan & Trust Co.) 158 U. S. 601, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108; Cella Commission Co. *v.* Bohlinger, 78 C. C. A. 467, 471, 147 Fed. 419, 423, 8 L. R. A. (N. S.) 537; Ballard *v.* Mississippi Cotton Oil Co., 81 Miss. 507, 34 South. 554, 555, 62 L. R. A. 407, 95 Am. St. Rep. 476.

In United States *v.* Reese, 92 U. S. 214, 218, 221, 23 L. Ed. 563, Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of the race, color, or previous condition of servitude of the voter." The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the two portions of the act applicable to them were readily separable. But the argument failed. The Supreme Court said:

"We are therefore directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make

it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, Congress possessed the constitutional authority to protect trade-marks in interstate and foreign commerce, and it enacted a statute which by its terms protected trade-marks in all commerce. The court was urged to restrict this law by construction to trade-marks in interstate and foreign commerce and to sustain it. But it cited and quoted from the opinion in the Reese Case, and held the act unconstitutional.

In Virginia Coupon Cases (Poindexter *v.* Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, the same argument was again met and overthrown with this declaration, which was subsequently quoted and affirmed in Income Tax Cases (Pollock *v.* Farmers' Loan & Trust Co.) 158 U. S., at page 636, 15 Sup. Ct., at page 920 (39 L. Ed. 1108):

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In Spraigue *v.* Thompson, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115, the Legislature of Georgia had enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions. The Supreme Court of that state sustained it upon the ground that the body of the act was readily separable from the exceptions. The Supreme Court reversed that decision and said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of

the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

The act of the Legislature of South Dakota expressly includes within the same general term "every common carrier engaged in trade or commerce in the state of South Dakota shall be liable to any of its employees, or in case of his death to his personal representative," carriers and employees in the constitutional and those in the unconstitutional class, those engaged in hazardous and dangerous, and those employed in comparatively safe occupations. The part of the statute applicable to the former class cannot be separated from that applicable to the latter class, so that each may be read and may stand by itself, because both classes are embodied in the general words "every common carrier" and "any employee" and are included in a single declaration. The unconstitutional part cannot be eliminated from the law by striking out or disregarding any words or clauses of the act. That result can be attained only by introducing into the statute words of limitation which would expressly restrict the general terms "every common carrier" and "any employee" to common carriers using dangerous power and machinery and their employees engaged in dangerous occupations about them, a species of legislation the courts are without the power to enact. United States *v.* Reese, 92 U. S. 221, 23 L. Ed. 563. Such a limitation would exclude from the operation of the act far the larger number of the employers now within it and a large portion, probably a majority, of the employees within it, and it is far from plain that, if it was the intention of the Legislature that the law should have this effect, the legislators would have enacted it with such a limitation. Indeed, the fact that they made no such limitation, and that they excepted none of the unconstitutional classes from the broad terms of the law, raises a conclusive legal presumption that they intended to make no such limitation or exception, and it would be judicial legislation for the courts to do so. Cella Commission Co. *v.* Bohlinger, 78 C. C. A. 467, 473, 147 Fed. 419, 425, 8 L. R. A. (N. S.) 537; Omaha Water Co. *v.* City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 12 L. R. A. (N. S.) 736; Madden *v.* Lancaster County, 12 C. C. A. 566, 572, 65 Fed. 188, 194; Wrightman *v.* Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; Union Central Life Ins. Co. *v.* Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860. The statute cannot be restricted law-

fully by construction to the constitutional class because the part applicable to that class is not separable from the part applicable to the unconstitutional class so that each may be read and may stand by itself, because it is not apparent that the Legislature would have passed the act if it had been limited to the constitutional class, because the Legislature excepted neither class, and the legal presumption is that it intended to except none, and because the statute cannot be restricted to the constitutional class by the elimination of words or clauses; but this result can be attained only by the introduction into it of express words or terms.

There are other questions of law urged upon our attention in this case; but, as they may not arise in another trial, no useful purpose would be served by discussing and deciding them now, for sufficient has been said and decided to determine the validity of the present judgment and to indicate the general course of proceedings hereafter, and the judgment is, accordingly, reversed, and the case is remanded to the court below with directions to grant a new trial.

MONTGOMERY & E. R. CO. *v.* RUTLAND.

(Supreme Court of Alabama, Jan. 18, 1910.)

[51 So. Rep. 831.]

Adverse Possession—Hostile Character of Possession—Use of Land.*—The use of a strip of land belonging to a railroad company, which extends in front of a gin house, for rolling the cotton on it after it was ginned and preparatory to being hauled a short distance to the railroad, is entirely consistent with the theory of permissive use by the railroad company.

Adverse Possession—Evidence—Questions for Jury.—In ejectment, defended on the ground of adverse possession of 10 years, evidence held not to show a continuous actual possession under a bona fide claim of ownership for a period sufficient to constitute title by adverse possession; nor was the evidence sufficient to warrant the submission of the question of title by adverse possession to the jury.

Appeal from Circuit Court, Bullock County; A. A. Evans, Judge.

Action by the Montgomery & Eufaula Railroad Company

*For the authorities in this series on the question whether title can be acquired against a railroad company by adverse possession, see foot-note of St. Louis, etc., R. Co. *v.* Ruttan (Ark.), 33 R. R. R. 96, 56 Am. & Eng. R. Cas., N. S., 96; foot-note of Southern Ry. Co. *v.* Gossett (S. Car.), 29 R. R. R. 502, 52 Am. & Eng. R. Cas., N. S., 502.

against W. J. Rutland. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

G. L. Comer, for appellant.
Ernest L. Blue, for appellee.

DOWDELL, C. J. This is a statutory action of ejectment, brought by the appellant against the appellee. There is but one assignment of error, and that is based on the refusal of the court below to give the general affirmative charge, requested in writing by the plaintiff, appellant here. The defendant relied on the defense of adverse possession of 10 years; it not being denied that the plaintiff had the older and superior paper title.

It is not questioned that the burden of showing adverse possession, in all of its essential elements, rested on the defendant, the party setting it up. This doctrine is too well settled to admit of doubt. What is required to constitute adverse possession has been repeatedly stated in the decisions of this court, and in the case of Chastang *v.* Chastang, 141 Ala. 451, 458, 37 South. 799, 801, 109 Am. St. Rep. 45, reaffirming the doctrine, it was said: "The essential elements of adverse possession are: (1) The possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. If any of these constituents be wanting, the possession will not effect a bar to the legal title"—citing a number of our decisions. The land sued for was a vacant, uninclosed lot in the town of Fitzpatrick—that is to say, vacant and uninclosed for many years, and up to the year 1903, when the defendant built a house thereon.

The witness, Moss, one of the grantors in defendant's chain of title, sworn in behalf of the defendant, testified that he had known the lot for 30 years; "that, when he first knew it, it was a vacant strip of land; that in or about the year 1878 there was a gin house and ginnery on or near the southern boundary line of said strip of land, which was run and owned by some of the grantors under whom the defendant claims title, to wit, Simon & Marks; that the front or north sill, upon which said gin house rested, rested on or extended over a few inches of said southern boundary line of said extra strip of land mentioned in the Fitzpatrick deed; that the vacant space in front of the said gin house was used by owners of said gin house and the patrons of the same for six or seven years or more during the ginning season for each year, and which ginning season lasted from three to four months each year, in rolling the cotton, when ginned, onto it preparatory to hauling said cotton from the gin and carrying it off to the railroad; that there was a road used by the owners of said gin and ginnery and the public generally, and which ran across said strip of land, from the public road

to said gin house and ginnery; and that this use of said strip of land continued for a period of eight or ten years just after the year 1878." This witness further testified "that he and one Barrett purchased the strip of land in 1894 from the Alabama Cotton Oil Company, who had run such ginnery and had had possession of and used said land, as shown by its deed, which has been introduced in evidence, and all of the deeds introduced in evidence embraced the strip of land just south of and adjoining the right of way of 50 feet of the railroad." This witness, on his cross-examination, further testified as follows: "That about the year 1886 the gin house and ginnery as described by him was moved away and established on the north side of said railroad, and that said strip of land 50 feet wide on the south side and adjoining the right of way was vacant until about the year 1903, when the defendant in this suit built a storehouse on a part of it; that after 1894 the witness cultivated a portion of said strip of land for one or two years, by planting a patch of Irish potatoes on a part of it, and that he did not use or have possession of it in any other way; that about the year 1894 he built a wire fence around a portion of said strip of land, and that the employees of the said railroad tore said fence down and removed it, and notified witness that said strip of land belonged to the railroad."

We have set out the testimony of this witness in full, for the reason that it is the most favorable evidence offered by the defendant in support of his plea of adverse possession. One other witness, introduced by the defendant, testified to his recollection of the gin house and ginnery, and of the witness Moss having cultivated a portion of the strip of land in potatoes one or two years, and so, too, the defendant, sworn in his own behalf, testified as to the ginnery and potato patch; but neither testified to anything more than did the witness Moss, whose testimony we have set out in full. This was all the evidence as to actual occupancy and use of the strip of land in question prior to the year 1903.

There is a total absence of evidence of any asserted claim of ownership of the strip of land by Simon & Marks, who erected and operated the gin house and ginnery. The only use they made of said strip of land, namely, in rolling the cotton on it from the gin house preparatory to its being hauled but a short distance to the railroad, was entirely consistent with the theory of a permissive use by the true owner, the railroad company, that was to receive the cotton for transportation; and, in the absence of any asserted claim of ownership (and of any such claim there is no evidence), such use in and of itself affords no reasonable inference of a hostile claim. Moreover, such possession of the strip of ground by the ginnery people continued only from 1878 to 1886—less than 10 years. The next act of actual

possession was by the witness Moss, in 1894, 8 years after the removal of the ginnery, when the said Moss put a wire fence around a portion of said strip; but it was removed by plaintiff's employees, and the said Moss was notified that the land belonged to the plaintiff. The evidence is silent as to what one or two years, after 1894, the said Moss cultivated a portion of the land in potatoes. So far as the evidence shows, it could as well have been in 1898 and 1899 as at any earlier time.

The evidence, we think, fell far short of proving that continuous actual possession, under a bona fide claim of ownership, for a period sufficient to constitute title by adverse possession. Nor did the evidence, we think, afford any reasonable inference of the existence of such facts as to warrant the submission of the question by the court to the jury In our opinion, the general charge, as requested by the plaintiff, should have been given, and its refusal was error.

Reversed and remanded.

SIMPSON, MCCLELLAN, and MAYFIELD, JJ., concur.

SHREVEPORT BRIDGE & TERMINAL CO. *v.* STATE BOARD OF APPRAISERS.

(Supreme Court of Louisiana, March 28, 1910. Rehearing Denied April 25, 1910.)

[52 So. Rep. 129.]

Taxation—Exemptions—Toll Bridge.—A bridge, built and operated by an independent corporation established for that purpose, is not exempt from taxation as part of a railroad, under the amendment to the Constitution proposed by Act No. 16 of 1904, because used by certain railroad companies, which pay tolls for the running of their trains over it; the earning of such tolls being the sole business in which the corporation owning and operating the bridge is engaged.

Appeal and Error—Jurisdiction—How Shown.—The appellate jurisdiction of this court, ratione materiæ, should appear on the face of the record, and the lack of such showing cannot be supplied by an ex parte affidavit, of which the opposing litigant has received no notice.

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the Shreveport Bridge & Terminal Company against the State Board of Appraisers. Judgment for defendant, and plaintiff appeals. Affirmed.

Alexander & Wilkinson, for appellant.

Walter Guion, Atty. Gen. (*R. G. Pleasant,* of counsel), for appellee.

Statement of the Case.

MONROE, J. Plaintiff is a corporation established under the law of this state, the objects and purposes of which are declared in its charter to be:

"To build, equip, maintain and operate a bridge over and across Red river, at or near the city of Shreveport, within one mile from the upper or lower limits of said city, with all necessary yards, side tracks, switches, main tracks, approaches and appurtenances, and, generally, to do everything that may be necessary to properly operate the said bridge, yards, tracks and approaches thereto, with full power, also, to build, equip, maintain and operate, in connection therewith, such additional lines of railroad, with tracks, locomotives and equipments, as may, hereafter, be desired. The said bridge to be used as a railroad bridge for the passing, or crossing, of trains, locomotives and cars, together with all their passengers and freight, with the right, in addition thereto, to construct on said bridge a roadway for the passage of persons, vehicles and animals, etc., provided that same shall, at any time, hereafter be deemed advisable, and the consent of the proper municipal authorities be obtained."

To carry out the purposes so declared, the company, between January 1, 1905, and say March 25, 1907, built a bridge, at a cost of $449,949.36, at the place and of the character mentioned (save that it is not yet adapted to the accommodation of persons, vehicles, etc.), for the use of which, it at present collects from two railroad companies, and has a contract under which it expects to collect from a third company, tolls to the amount, from each company, of $12,000 a year. The bridge was assessed for the year 1908 at $160,000, and, so far as the record shows, no complaint was made. For the year 1909 the company appears to have returned the bridge to the State Board of Appraisers as trackage, at a valuation of $2,880; but it was assessed at $160,000, as in 1908. If any complaint was made to the board, or effort to obtain reduction, it is not shown by the record. The object of the present suit is to have the property decreed exempt from taxation and the assessment annulled, or to have it decreed that the State Board of Appraisers is without authority to make the assessment, or to have the assessment reduced to $5,000. The grounds relied on for the obtention of the relief sought are stated in the petition substantially as follows:

(1) That the bridge is part of a railroad, and, having been begun and completed between January 1, 1905, and January 1, 1909, is exempt from taxation, under the amendment to the

Constitution proposed by Act No. 16 of 1904 and adopted in November of that year.

(2) That, if it be not exempt as part of a railroad, the power to make assessments, vested in the State Board of Appraisers, does not extend to it.

(3) That, if it be not exempt, and the State Board of Appraisers is authorized to assess it, the assessment, as made, is exorbitant, and in excess of that placed on other property similar in character.

Opinion.

The provisions of the Constitution upon which plaintiff relies read as follows:

"There shall be exempt from taxation, for a period of ten years from the date of its completion, any railroad, or part of railroad, that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909. This exemption shall include and apply to all the rights of way, roadbed, or sidings, rails and other superstructures upon such rights of way, and to all depots, station houses, buildings, erections and structures, appurtenant to such railroads, and the operation of the same, but shall not include the depots, warehouses, station houses, and other structures and appurtenances, nor the land upon which they are erected, at terminal points, and for which franchises have been granted and obtained, whether same remain the property of the present owner or owners or be transferred or assigned to any corporation or corporations, person or persons, whomsoever; and provided, further, that this exemption shall not apply to double tracks, sidings switches, depots, or other improvements or betterments which may be constructed by railroads now in operation within the state, other than extensions, or new lines, constructed by such railroads."

The obvious purpose of this provision was to encourage the building of new railroads in this state and the extension of the lines of railroads already built; but the further purpose strictly to limit the exemption to such new railroads, or parts or extensions of roads, is made manifest by the specific exclusion therefrom, whether with respect to projected or existing roads, of "depots, warehouses, station houses and other structures, at terminal points, and for which franchises have been obtained and granted," and by the exclusion from such exemption of "double tracks, sidings, switches, depots, or other improvements or betterments which may be constructed by railroads now in operation within the state, other than the extensions or new lines constructed by such railroads."

If the bridge in question could be regarded as part of a railroad, the question which suggests itself is: Of what railroad is it a part? And the record furnishes no answer. It can hardly

be a part of either of the roads, the names of which are mentioned in the petition, and by the witnesses, since they each pay $12,000 a year as tolls for running their trains over it, and neither corporations nor individuals pay for the privilege of using their own property. Upon the other hand, the record shows affirmatively that the bridge is the property ("in fee simple," the petition alleges) of the plaintiff, and that plaintiff is a corporation created for the purpose of building and operating a bridge, to be used for railroad and other purposes, and "in connection therewith, such lines of railroad, tracks, locomotives and equipments as may hereafter be desired." But for an independent company to construct a toll bridge and to furnish it with the equipment needed for the accommodation of its patrons does not identify the company with the business of such patrons, or make the bridge a part of their respective outfits. The bridge remains a toll bridge, no matter who uses it, and is no more part of a railroad, because a railroad company, paying $12,000 a year for the privilege, runs its cars over it, than it will become an appurtenance of a cotton plantation, when, in the future, a cotton planter may haul his cotton over it in his wagons, though, if it belonged to the railroad company or the planter, the case would be different. The case of State (Cent. R. Co., Prosecutors) *v.* Mutchler, Collector, 41 N. J. Law, 96, to which we are referred, is inapplicable.

The exemption was there claimed (on a bridge built by one railroad company and leased by it to another, and used by the latter as part of its line) under a statute which granted exemption "to all railroad corporations or companies occupying or using railroads in this state, whether as lessees or otherwise." And the court said:

"The state of the case agreed on shows that the bridge was used by the prosecutor as a railroad bridge, and for no other purpose. It was part of the prosecutor's railroad. * * * It was also held and used by the prosecutor, as lessee, within the meaning of the act of 1873."

In the instant case the bridge is shown not to be a part of any railroad, but to be the property of a corporation which was organized to build and operate it, and which charges certain railroad companies tolls for running their trains over it; that being the only business in which it is engaged.

As to the other points presented, there is nothing in the record to show that this court is vested with jurisdiction ratione materiæ; the state not having appeared to have received notice of the filing in this court of the affidavit of plaintiff's counsel on the subject of the amount of the tax involved.

Judgment affirmed.

DUBUQUE & S. C. R. Co. et al. *v.* FT. DODGE, D. M. & S. R. Co. et al.

(Supreme Court of Iowa, April 6, 1910.)

[125 N. W. Rep. 672.]

Eminent Domain—Public Use—Extent of Use.*—If the public has the right to use, and will probably use, a spur track for which a crossing is sought to be acquired over another railroad, there was a sufficient public use, though the track would be used mainly to carry freight for a manufacturing company.

Eminent Domain—Public Use—Extent.—If a use is public, its extent is immaterial upon the exercise of the right of eminent domain.

Railroads—Railroad Crossing—Necessity.—Defendant interurban railway desired to cross the track of plaintiff steam railroad at grade, by an 800 foot extenion of its existing spur track, to reach certain mills. The mills could be reached without a crossing by building another spur, from a point over a mile distant, through rough land, which would require some 2,000 feet of deep cuts. A subway crossing at the desired point would be several times as expensive to build as a grade crossing with an interlocking system, as proposed, and difficult to drain; the land being low and swampy. The crossing proposed, when operated independently of a similar crossing of another railroad about a mile distant to which much switching was daily done on interchange of freight, could not interfere with plaintiff's eastbound traffic, and rarely with the west-bound trains. Held, that the grade crossing was reasonably "necessary," and would not "unnecessarily impede travel," or "transportation" on plaintiff's road, within Code, § 2020, permitting a railroad to cross another road under such conditions.

Appeal from District Court, Webster County; C. E. Albrook, Judge.

Action in equity to restrain the defendant from crossing the plaintiff's road at grade. There was a judgment dismissing plaintiff's petition, and they appeal. Affirmed.

Kelleher & O'Conner, for appellants.
S. R. Dyer and *Healy & Healy,* for appellees.

SHERWIN, J. The Dubuque & Sioux City Railroad Company owns the steam road that the defendant seeks to cross. It is

*For the authorities in this series on the question, what constitutes a public use for which private property may be condemned, see foot-note of Dotson *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 693, 57 Am. & Eng. R. Cas., N. S., 693; second foot-note of State *v.* Superior Court of King County (Wash.), 33 R. R. R. 423, 56 Am. & Eng. R. Cas., N. S., 423.

operated, however, by the Illinois Central Railroad Company as part of its through line from Chicago, Ill., to Omaha, Neb., and Sioux City, Iowa, passing through Ft. Dodge. East of Ft. Dodge all of the traffic of the road passes over a single track. The Ft. Dodge, Des Moines & Southern Railroad is an interurban electric road with its main line between Des Moines and Ft. Dodge, and it crosses the plaintiff's road a little east of the corporate limits of Ft. Dodge by an under crossing. There are several extensive manufacturing industries some three or four miles east of Ft. Dodge and near the plaintiff's road on both the north and south sides thereof. The defendant road has built east from Ft. Dodge to some of the plants that are north of plaintiff's road, and proposes to extend its tracks across the plaintiff's road at the point in question for the purpose of reaching the mills on the south thereof. The defendant wants to make a grade crossing and install an interlocking plant therefor, and the plaintiffs ask that it be enjoined from so doing.

The appellants contend that the evidence shows that the proposed extension of the defendant's road and the crossing in question are intended merely for the purposes of switching, or, at most, for industrial purposes, and that such use is not a public use. It is conceded, of course, that the power of eminent domain can only be exercised for the public good; and hence the question is whether the evidence shows that the proposed road and crossing will benefit the public. There is evidence tending to show that the main purpose thereof is to reach the product of mills situated south of the plaintiff's road. But there is also evidence showing that it will furnish the public with additional conveniences for travel and for the transportation of freight. It may be that, where a railroad is built for the sole and only purpose of reaching a particular manufacturing establishment, it should not be held to be built for public use. But it seems clear on principle that a public use exists whenever it appears that the public has the right to use a road, and will in all probability do so to some extent at least. And, when once it is found that the use is public, the right of eminent domain exists, though private purposes may be subserved at the same time. Nor does the transportation of freight alone make the road one for private use. Phillips *v.* Watson, 63 Iowa, 28, 18 N. W. 659; Lewis, Eminent Domain (2d Ed.) § 170; Elliott on Railroads, § 961a; Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 469, 43 N. W. 469, 6 L. R. A. 111. If the use is public, the extent of such use can make no difference with the right. We think the use is shown to be public in this case.

A much more serious question is presented by the appellants' contention that the crossing is not necessary within the meaning of the statute, and that a grade crossing at the point in question will unnecessarily interfere with the operation of its road. Sec-

tion 2020 of the Code provides that a railway may be constructed or carried "across, over, or under" another railway, "when it may be necessary in the construction of the same, and in such cases it shall so construct its crossings as not unnecessarily to impede the travel," or "transportation * * * upon the railway * * * so crossed." The proposed crossing is only a little over a mile east of the crossing of the main line, and it is urged that the defendant can reach the same mills and render the public the same service by building from its main line east, south of the plaintiff's road. That it is possible to build a road there is fully shown by the evidence. The expense would be great, however, for about 2,000 feet of the distance would necessarily consist of deep cuts and high hills. It would also require much additional track through rough land because the road that it is proposed to extend is now constructed to within 800 feet of the proposed crossing. In addition to the objection already named, it appears that the building of a line there would necessitate the operation of two roads into a part of the same territory or the abandonment of the one already built to within 800 feet of the proposed crossing. The statute only requires that the crossing shall be reasonably necessary. An absolute necessity need not exist. It is enough if it appears that the crossing is reasonably necessary and proper for the accomplishment of the purpose proposed, namely, the reasonable accommodation of the public. Mobile & C. R. Co. *v.* Alabama & C. R. Co., 87 Ala. 501, 6 South. 404; Peoria R. Co. *v.* P. & R. Co., 66 Ill. 174; New York & R. Co. *v.* Boston R. Co., 36 Conn. 196; Elliott on Railroads, § 1119. If the obstacles presented by a proposed route are so great as to prevent the building of the road, it is manifest that a different route may be necessary, for the proper service of the public, and, in that view of the question, it is entirely legitimate to consider the question of the expense of building south of the plaintiff's track from the defendant's main line crossing. The statute confers the right to cross another road when it may be necessary in the construction of a new road, and the only limitation on such right is that the crossing shall be so made as not unnecessarily to interfere with the use of the senior road.

The remaining question, then, is whether a crossing at grade with an interlocking plant of standard design and construction will unnecessarily interfere with the plaintiff's use of its road. The appellants insist that it will, and that, if the defendant is permitted to cross at that point, it should do so through a subway crossing. The Chicago Great Western crosses the plaintiff's road a little over a mile east of the proposed crossing, and the interchange of business between the two roads requires more or less switching over the plaintiff's road from Ft. Dodge east to the Great Western crossing. And the evidence shows that some

switching is done every day by an engine sent out from Ft. Dodge for that purpose. There are also 20 trains a day over the plaintiff's main line at the point in question. A subway would undoubtedly remove all of the ordinary causes of delay on account of crossings, and it would also lessen the danger of accidents whether the crossing is equipped with an interlocking device or not. But the statute does not require a subway crossing. All that it requires is that the crossing road shall not unnecessarily impede travel and transportation on the crossed road. Humeston & S. Ry. Co. *v.* C. & St. P. & K. Ry. Co., 74 Iowa, 554, 38 N. W. 413; Railway Co. *v.* Railway Co., 91 Iowa, 16, 58 N. W. 918. As was said in both of these cases, the character of the crossing which should be required must depend largely upon the facts of each case. A grade crossing might be the right thing in a particular instance and be absolutely intolerable under different conditions. But it is a matter of common knowledge that under ordinary conditions and with reasonably good service a grade crossing protected by an interlocking system does not cause serious or unnecessary delay within the meaning of the statute. Nor is the danger to the public such as cannot be avoided by the exercise of proper care. The land at the place of the proposed crossing is practically level and somewhat low and swampy. It is crossed by the plaintiff's road on a fill of about 3½ feet, and a subway for the transaction of the defendant's proposed business could not be much less than 20 feet deep. The expense of draining the same would be great, and the entire cost thereof would be from $33,000 to $38,000, while the cost of a grade crossing and an interlocking plant would not exceed one-fourth of that amount. And the relative expense of the two crossings may properly be considered in determining which shall be made. Humeston Case, supra; Railway Co. *v.* Railway Co., supra. The only unusual conditions to be met in the operation of an interlocking system at the proposed crossing would be the proximity thereto of the interlocking system at the Great Western crossing over a mile east of there. But the evidence is not at all convincing that the two systems, operated independently, would interfere with the movement of the plaintiff's long freight trains. Such could not be the case with its eastbound trains, and we are of the opinion that such instances would be rare when its trains were west bound.

A careful examination and consideration of the entire evidence has convinced us that the order of the trial court should be, and it is, affirmed.

Affirmed.

RASCH *v.* NASSAU ELECTRIC R. Co. et al.

(Court of Appeals of New York, April 26, 1910.)

[91 N. E. Rep. 785.]

Eminent Domain—Compensation—Additional Servitude—Street Railroad.*—A street railroad is not a strict use, but an additional burden placed on the land, for which the owner of the fee in the street is entitled to compensation.

Eminent Domain—Compensation—Additional Servitude—Street Railroad.*—Where an abutter does not own the fee in the street, damages from the construction of a street railroad may be restricted to injury to light, air, and access, his only easements; but, if he owns the fee subject to the public easement, he may recover additional damages which proper operation of the road entails.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Caroline E. Rasch against the Nassau Electric Railroad Company and another. A judgment for plaintiff was affirmed by the Appellate Division (129 App. Div. 897, 113 N. Y. Supp. 1143), and defendants appeal. Affirmed.

James C. Church, for appellants.
Charles H. Strong, for respondent.

CULLEN, C. J. The action is brought in equity by the owner of a residence on Union street in the borough of Brooklyn, who also owns the fee in the adjacent street, to recover rental and fee damages for the construction and operation of a trolley railroad in front of her house. There is no question as to the liability of the appellants, but it is complained that improper elements of injury were considered in estimating the plaintiff's damages. The trial court, as appears by its findings, awarded damages not only for the injury to the plaintiff's easements of light, air, and access, but also for that due to the noise and vibration as a result of the operation of the cars on plaintiff's property in the street.

It is contended by the learned counsel for the appellants that the recovery should have been confined to damages resulting from the injury to the easements of light, air, and access to the plaintiff's adjoining residence, and reliance is principally based on our decisions in the elevated railroad cases, of which American Bank Note Company *v.* New York Elevated Railroad Company, 129

*For the authorities in this series on the question whether a street railway constitutes an additional servitude, see foot-note of Hutcheson *v.* International, etc., R. Co. (Tex.), 33 R. R. R. 105, 56 Am. & Eng. R. Cas., N. S., 105.

N. Y. 252, 29 N. E. 302, is the leading authority. Undoubtedly such is the rule in that class of cases, but the basis of the rule is that in those cases (without a single exception that I can find, or to which our attention has been called) the plaintiff did not own the fee of the street. His right to any compensation rested on the fact that he had easements in the street of light, air, and access, and as these were his only easements, necessarily it was only for an invasion of those easements for which he was entitled to compensation, except where the defendants were trespassers. In the case of Matter of the Brooklyn Union Elevated Railroad Company *v.* Oliff, 113 App. Div. 817, 99 N. Y. Supp. 222, affirmed by this court 188 N. Y. 553, 80 N. E. 1105, to which the appellants refer, the plaintiff was merely an abutter. But the rights of the plaintiff in this case rest on a different foundation. She is the owner of the fee subject to the public easement. It was held by this court over 40 years ago in Craig *v.* Rochester City & B. Railroad Company, 39 N. Y. 404, and reiterated 7 years ago in Peck *v.* Schenectady Railway Company, 170 N. Y. 298, 63 N. E. 357, that a street railroad is not a street use, but an additional burden placed on the land for which the owner of the fee is entitled to compensation. What should be the proper measure of compensation to a landowner, part of whose lands are taken by eminent domain, was for a long time a mooted question, the decisions being those of the Supreme Court. In one set of cases it was held that the owner was entitled to the value of the land taken and compensation for the injury caused the remaining land by the severance, but not for injuries occasioned by the particular use to which the land taken was to be put. In another set of cases a contrary doctrine was maintained, and it was held that the landowner was entitled to compensation for damage caused by the use to which the land was appropriated. In the case of American Bank Note Company, *supra*, Judge Finch intimated doubt as to the propriety of the rule allowing compensation for the particular use which was to be made of the land acquired. In Bohm *v.* Metropolitan Elevated Railway Company, 129 N. Y. 576, 585, 29 N. E. 802, 804 (14 L. R. A. 344), Judge Peckham said: "As to the land remaining, the question has been to some extent mooted, whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule." The comments of the two learned judges who wrote in these cases were obiter, for in neither was the point involved; the plaintiff being a mere abutter. They have been cited merely to show the difference of opinion that existed

on the subject. For the first time the question was squarely presented to this court in South Buffalo Railway Company *v.* Kirkover, 176 N. Y. 301, 68 N. E. 366, and it was held: "Where land is acquired by a railroad company without the consent of the owner, he is entitled to recover the market value of the premises actually taken, and also any damages resulting to the residue, including those which will be sustained by reason of the use to which the portion taken is to be put by the company." We think that decision is conclusive against the appellants. The rule in the Kirkover Case is not to be misconstrued. Of course, it does not include injuries from the improper operation of the railroad. Those can be restrained at the suit of the party aggrieved, or damages may be recovered for them. But the rule does include all damages which the proper operation of the railroad entails.

The appellants, however, further contend that this court has decided that the value of the fee of the street is only nominal. Matter of City of New York (Decatur Street) 196 N. Y. 286, 89 N. E. 829. If this were to be conceded, I do not see that it would help the appellants in the face of our decision in the Kirkover Case, for under that decision the landowner may be entitled to consequential damages much greater than the value of the land taken. But the Decatur Street Case does not decide the proposition contended for. In that case the owner of the fee of the street, who had sold the land abutting thereon, was given an award for the full value of the land as unincumbered by any easement of the abutters, who practically were to pay the award by assessment. After the confirmation of the award, to remedy this injustice the abutting owners applied to have the award paid to them, to which claim the Special Term and Appellate Division acceded. We reverse the action of the courts below, holding that the courts could not transfer the award from one party to the other. But at the same time we took occasion to point out the injustice and show how it could be remedied by applying to vacate the order of confirmation. In that discussion we did say that the owner of the fee was entitled to no more than nominal damages. But the ownership of a fee of a street disconnected with adjoining land and subject to the easements of abutting owners is a very different thing from the fee of a street in connection with other property which abuts on the street. It is just this distinction which is pointed out by Judge Gray in City of Buffalo *v.* Pratt, 131 N. Y. 293, 299, 30 N. E. 233, 234, 15 L. R. A. 413, 27 Am. St. Rep. 592, where he said: "It is unquestionable, however, that the ownership of the fee of the land in a street has a substantial value to the abutting property holder, in the degree of control it gives to him over the uses to which the street may be put. It vests him with the right to defend against and to enjoin a use of, or an encroachment upon, the street,

under legislative or municipal authority, for purposes inconsistent with those uses to which streets should be or have been ordinarily subjected, unless just compensation is provided to be made."

The appellants, while conceding that ordinarily before acquisition or condemnation of the land a railroad company may be treated as a trespasser, and subjected to consequential damages, contend that in the present case the general rule is inapplicable. It is unnecessary to consider this point, for if the elements of damage of which they complain are competent, as we hold, in estimating compensation for the fee, of course they are equally competent in estimating rental damages under any circumstances.

The judgment appealed from should be affirmed, with costs.

GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur, CHASE, J., absent.

Judgment affirmed.

HYDE *v.* MINNESOTA, D. & P. RY. CO.

(Supreme Court of South Dakota, Dec. 15, 1909.)

[123 N. W. Rep. 849.]

Appeal and Error—Reversible Error.—Failure of the court to find or to submit to the jury, in a proper case, a material issue arising at the trial is reversible error.

Eminent Domain—Remedies of Owner—Injunction.—A court of equity, in the proper case, will enjoin a threatened trespass or injury, consisting of the taking of private property for public use, without just compensation.

Eminent Domain—Damages.—Under Const. art. 6, § 13, providing that private property shall not be taken for public use, or damaged, without just compensation, which shall be paid as soon as it can be ascertained, and before possession is taken, it is presumed that damages occasioned by the taking and appropriation of the property are capable of ascertainment and compensation in a court of law, in view of the fact that the law provides for such assessment.

Eminent Domain—Damages.—Under Const. art. 6, § 13, providing that private property shall not be taken for public use without just compensation, as determined by a jury, only a single action or assessment and payment of damages is contemplated.

Eminent Domain—Remedy of Owner—Enjoining Operation of Railroad.—Civ. Code, § 2284, provides that as a general rule compensation is a relief of a remedy provided by law for violation of private rights, etc., and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code. Section 2359 provides that preventive relief is granted by injunction, provisional, or final. Section 2361 provides that an injunction may be

granted to prevent the breach of an obligation existing in favor of the applicant, (1) where pecuniary compensation would not afford adequate relief, (2) where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief, and (3) where the restraint is necessary to prevent a multiplicity of judicial proceedings. Held, that such sections do not authorize enjoining a railroad company from the operation of a road on its own property until payment of the damages to other property in the neighborhood.

Eminent Domain—Injunction.—Where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted, or without complying with the conditions on which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of the irreparable damages, or the existence of legal remedies which may afford a money compensation.

Eminent Domain—Damages.—The constitutional requirement that damages must first be ascertained and just compensation made before private property is taken for public use has no application to the use by a private owner of his own property, but applies only to those cases where it is necessary to acquire the right to use and occupy property through the exercise of the power of eminent domain.

Eminent Domain—Enjoining Construction.—Injunction will not lie to restrain a railroad from making improvements on its own property without first proceeding, by condemnation action, to assess and pay consequential damages when such damages are already accrued, and a plain, speedy, and adequate remedy exists in an action at law.

Appeal from Circuit Court, Brown County.

Action by Charles L. Hyde against the Minnesota, Dakota & Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Taubman, Williamson & Herried, for appellant.
Campbell & Taylor and *Geo. W. Severs,* for respondent.

SMITH, J. The plaintiff brings this action, invoking the equity powers of the court, to restrain the defendant, the Minnesota, Dakota & Pacific Railway Company "from locating, constructing or operating its railway in said city from the southern limits thereof northerly across Twelfth avenue and thence westerly between Eleventh and Twelfth avenues to the right of way of the Chicago, Milwaukee & St. Paul Railway Company, until the just compensation that should be paid to the plaintiff by reason of the damage to his property aforesaid shall have been determined by a jury in the manner provided by law, and such compensation paid to the said plaintiff." The complaint alleges that "the defendant railroad corporation is about to and is in the

act of constructing and locating a railroad, depot grounds, switch yards, coal bins, water tanks, depot and engines house through, upon and over the row of blocks in said city beginning at the southern limits thereof, through blocks 36 and 35 of Thomas' addition to said city, which are next east of Lincoln street, as aforesaid, thence westerly between Eleventh and Twelfth avenues, as aforesaid, to the Chicago, Milwaukee & St. Paul railway right of way, tracks and depot grounds, which are located one block west of and paraliel with Fourth street as hereinbefore described. And the said defendant corporation tends to and has taken and appropriated all of said blocks between Eleventh and Twelfth avenues as aforesaid, and block 36 in said Thomas' addition aforesaid, for the purposes aforesaid, and does take and appropriate all of blocks 38, 43, 46, 51, 54, and 59 in Thomas' addition to the said city of Aberdeen," and "that by reason of the construction, location and intended operation of the defendant's railway, switch yards, stock yards, depot, coal bins and water tanks in the location hereinbefore described, the real estate and premises of this plaintiff hereinbefore described, located south of Twelfth avenue, will be greatly damaged and rendered practically valueless to the said plaintiff by reason of the location, construction, and operation of defendant's railway, switch yards, depot, freight houses, coal bins, water tanks and stock yards, immediately north of across Twelfth avenue and between the property of the plaintiff and the business and residence portion of said city of Aberdeen and by reason of the noise, dust, smoke, offensive oders, danger of fire and inability to reach the business and residence portion of said city from the said property of this plaintiff without being compelled to cross the tracks and switch yards of the defendant railway corporation." And further alleges that the defendant has taken no steps seeking to exercise the right of eminent domain by assessment of damages or payment of just compensation for such injuries. The answer is a general denial as to the foregoing allegations of the complaint. The issues thus arising were tried to the court, and findings of fact and conclusions of law made and entered, and judgment thereon duly entered denying the relief asked and dismissing the action.

It was admitted on the trial that "no proceedings have been commenced on the part of the defendant to have the damages, if any have been suffered by the plaintiff, assessed in condemnation proceedings as to the property described in the complaint." The court finds, in substance, that the plaintiff is the owner of certain lots in blocks 37, 44, 45, 52, and 53, in Thomas' addition to the city of Aberdeen, being a row of city blocks running east and west along the south line of the city limits; that the defendant railway company owns the entire row of blocks next north across Twelfth street, and running east and west

parallel to the row of blocks in which plaintiff's lots are situated; and that the defendant company has constructed its railway tracks, depot, switch yards, and engine house thereon, and that the most southerly of said railway tracks is located 82 feet north of the north line of said Twelfth street and 148 feet distant, at the nearest point, from the plaintiff's property; that none of plaintiff's property is taken, appropriated, or trespassed upon by the improvements made by defendant or in the operation of its line of railway; and that none of the streets or alleys in said city are appropriated, passed over, or occupied by the railway company at any point where plaintiff's property abuts said streets or alleys. No finding is made by the court on the question of plaintiff's damages. The evidence is wholly undisputed on both sides, and the question presented for review is whether on the whole record, the court was in error in refusing the relief sought by the plaintiff.

The first assignment of error is upon the failure of the court to make any finding upon the subject of plaintiff's alleged damages. The plaintiff on the trial introduced evidence tending to show that the building of the railway depot, switch yards, water tanks, round house, coal bins, etc., on the blocks north of plaintiff's property was exceedingly harmful and detrimental, and tended to depreciate its value as residence property, by reason of proximity thereto, and that the noise, smoke, etc., are harmful to such residence property. Also, that his property was rendered less accessible because of the necessary crossing of numerous railway tracks in reaching it from the business and residence portions of the city lying to the north thereof. No objection was made on the trial to the competency of evidence tending to prove the specific class or kind of damages claimed, and that question is not before us. That a failure of the court to find, or to submit to a jury in a proper case, a material issue arising at the trial is reversible error has been settled by this court. Taylor *v.* Vandenberg, 15 S. D. 480, 90 N. W. 142; McKenna *v.* Whittaker, 9 S. D. 442, 69 N. W. 587; McPherson *v.* Swift, 116 N. W. 79. In the latter case this court says: "It is error for a trial court to refuse or fail to find upon any material issue of fact. * * * Nevertheless such refusal or failure may not be ground for reversal because not prejudicial to any substantial right. When the existence of the omitted finding would not change the ultimate result—as where a complete affirmative defense is established—failure to find some fact essential to the plaintiff's cause of action will not justify a reversal. The law neither does nor requires idle acts. Rev. Civ. Code, 2431."

Appellant's counsel prepared and submitted to the trial court at the proper time requests for findings of fact on the question of plaintiff's damages, and now assigns as error the refusal or failure of the court to make any finding thereon. That such finding

was absolutely essential to the plaintiff's alleged cause of action is apparent. It therefore becomes necessary to inquire, assuming such finding to have been made in plaintiff's favor as requested, whether upon the whole record the plaintiff would have been entitled to the relief demanded in this action. If so, then the failure or refusal of the trial court, to find upon the issue of plaintiff's damages is clearly prejudicial, and reversible error; if not, then such error was not prejudicial to plaintiff's substantial rights, and is not reversible error. The question thus presented upon the record necessarily involves a consideration of section 13, art. 6, of our state Constitution, relating to the right of eminent domain, which is recognized thereby, and the payment of damages as a condition precedent to the exercise of such right, which is found in the Bill of Rights, and reads as follows: "Sec. 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained, and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners subject to the use for which it is taken." Section 18, art. 17, is found among the provisions of the Constitution, relating to corporations, and by its language seems designed not only to recognize such right, but to make more definite the cases in which damages contemplated thereby may arise. "Sec. 18. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements which compensation shall be paid or secured before such injury or destruction. The Legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases."

In the view we take of this case it is not necessary to enter upon a discussion of the various elements of the damages which must be assessed and paid or secured as a condition precedent to the "taking, injury or destruction" or "the taking possession" of private property for such public uses. That a court of equity, in a proper case, will enjoin a threatened trespass or injury of the kind contemplated by these constitutional provisions is too well settled to require a citation of authorities. Searle *v.* City of Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345. That any damages which must be assessed and paid "before possession is

taken," whether they be occasioned by the actual taking and appropriation of the property, or are merely consequential in character, are capable of ascertainment and compensation in a court of law, must be presumed, in view of the fact that the law provides for such assessment. This assessment necessarily covers and includes all damages accruing from the construction of the railway, whether they be such as might flow from a continuing trespass and might involve a multiplicity of suits, or are such as result from a direct appropriation of or injury to the property itself. Only a single action, or assessment and payment of damages, is contemplated. And the rule of damages for such injury, being once settled and ascertained, would apply equally whether the question arose in a condemnation proceeding, or in an action at law for the damages after the same have accrued. The record in this case discloses that the defendant railway company is, and at all times since the bringing of this action has been, in the actual possession and occupancy of the property taken and appropriated for the construction and operation of its road and other improvements, and the injuries to this plaintiff's property by reason thereof and for which damages, if any, could be assessed, have already fully accrued. The only injunctive relief therefor, which could be granted this plaintiff, would be an order ousting the defendant company from possession of its property or enjoining and restraining it from operating its railway.

It is true that under section 18, art. 17, individuals and corporations, "invested with the privilege of taking private property for public use," are required to make "just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation must be paid or secured before such taking, injury or destruction"; but the mere fact that an individual or corporation may be "invested with that privilege" does not create a new class of persons, nor limit the right of any person to use his own property in the same manner he might use it if not invested with such privilege. It is not the public character of the use to which property owned by individuals or corporations may be put which creates the liability for damages arising under these constitutional provisions. Such public use is merely the condition upon which may be exercised the privilege to "take, injure or destroy private property." Hence the constitutional inhibition extends only to an attempted exercise of the privilege. An individual or a corporation owning property may put it to any lawful use, but will be called upon to respond in damages in a court of law for any use which unlawfully injures others, and, under well-recognized rules of equity in proper cases, may be enjoined from committing such injuries. But the equity jurisdiction thus arising does not flow from the constitutional provisions above referred to.

This action invokes no rule of equity under which preventive relief may be had, and claims no right to equitable relief on any ground, save these constitutional provisions, that possession shall not be taken by one who seeks to exercise the right to take private property for public use, until compensation in damages shall first be made. Such relief is appropriate, and would be granted in all proper cases where there is a threatened invasion of private rights of property. But the Constitution does not change or enlarge in any degree the jurisdiction or powers of courts of equity. Section 2284 of the Civil Code provides: "As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code." Section 2359: "Preventive relief is granted by injunction, provisional or final." Section 2361: "Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant: 1. Where pecuniary compensation would not afford adequate relief. 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings." That this action does not come within any of these provisions of law defining the cases in which preventive relief by injunction may be given seems too obvious to require discussion.

It is clear that this plaintiff has a plain, speedy, and adequate remedy in an action at law to recover the damages, if any, which have already accrued to his property by the acts of the defendant. He may recover in such action under precisely the same rule of damages which would apply in an assessment of damages in a condemnation proceeding. Such damages as may be thus recovered the law deems adequate compensation, and therefore must be deemed full and adequate relief, and the damages are no more difficult of ascertainment in an action at law than in a proceeding by condemnation. No multiplicity of suits can be involved as a ground of equitable relief, because the damages may be, and must be, determined and fully and finally ascertained in a single action, whether it be in a proceeding by condemnation or in an action at law. "Where the right of recovery depends wholly upon constitutional provisions giving compensation for property damaged or injured, there can be but one recovery. Since the suit is necessarily one for just compensation, once for all, for the injury to the land." Lewis, Eminent Domain, par. 653b; O'Brien *v.* Penn. S. V. R. R. Co., 119 Pa. 184, 13 Atl. 74; Eachus *v.* Los Angeles, etc., R. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Atkinson *v.* Atlanta, 81 Ga. 625, 7 S. E. 692; Smith *v.* Floyd Co., 85 Ga. 422, 11 S. E. 850;

Springer *v.* Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; Markowitz *v.* Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498; Martin *v.* Chicago, etc., R. R. Co., 47 Mo. App. 452; Cass *v.* Pennsylvania Co., 159 Pa. 273, 28 Atl. 161.

In Lewis, Eminent Domain, par. 631, it is said: "It is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the Constitution and the laws." Paragraph 632: "The grounds upon which equity takes jurisdiction in such cases are not always plainly defined and differ in different jurisdictions. Perhaps a majority of the cases are put upon the ground of irreparable injury and the consequent lack of an adequate remedy at law. In a few cases the relief has been denied on the ground that the remedy at law was adequate. But in most of these there were other circumstances which rendered it inequitable to grant the relief, while, in many of the cases in which injunctions were granted on the ground of irreparable injury, it was plain enough that the injury could have been readily repaired or fully compensated in money. It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds; namely that where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property, to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation. The remedy in equity protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedies. The Supreme Court of Alabama, in discussing the question, uses the following language: 'The principle upon which a court of equity proceeds, in interferring to prevent bodies corporate having compulsory power to enter upon, take and appropriate for their own uses the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, or of nuisances, or of trespasses, when only private rights, or the acts of persons, natural or artificial, not having such powers are involved. In the latter class of cases, if the right be strictly legal, and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court that a case of irreparable injury be shown; a case for which the courts of law do not furnish an adequate remedy. The Constitution not only compels all corporate bodies, public, or private, or all individuals who may be armed with the power of taking private property, but it compels the state and all its

agencies and instrumentalities to the duty of first making just compensation to the owner. * * * It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the Constitution. A court of equity will intervene to keep them within the line of authority, and to compel obedience to the Constitution, because of the necessity that they should be kept within control, and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner.' "

It appears, however, in the case at bar, that the defendant company had acquired title to, and had entered upon possession of, the real property upon which all its works and improvements are placed prior to the commencement of this action. There was no actual taking of any part of plaintiff's property, nor is it shown that any physical injury thereto has actually accrued. None of plaintiff's improvements or works abut upon any street alley, whereby actual ingress or egress to such property is in any degree obstructed. It further appears that plaintiff's lots are vacant and unimproved property, and the only injurious effects thereto are those which may affect its value and desirability as residence property by reason of proximity to the railroad and its appurtenant structures. It may be pertinent, also, to observe, that the right to construct railroads and erect improvements necessary and proper for their operation is not conferred by the provisions of the Constitution relating to the exercise of the power of eminent domain. Either corporations or individuals may construct, own, and operate lines of railway without in any single instance finding it necessary to exercise the privilege, given them under the Constitution and the law, to take and appropriate private property for such use. A corporation, by virtue of the powers vested in it by the law of its creation, may purchase and own property necessary for its legitimate uses and purpose, and as such owner assumes the same

duties and liabilities as to its use and occupancy as are assumed by a natural person, and no more. This is precisely the situation presented in this case. As disclosed by the record, the defendant company at the time this action was brought, occupied and owned the property on and over which it has built its line of railway and improvements adjacent to the plaintiff's property, and, so far as this plaintiff's rights are concerned, the defendant is, and was then, merely a private owner of private property. As such private owner, the defendant is not shown to have done any act detrimental to plaintiff's property which might be restrained in a court of equity. The requirement of the Constitution that damages must first be ascertained and just compensation made has no application whatever to the use by a private owner of his own property, but has application only to those cases where it is necessary to acquire the right to use and occupy property through the exercise of the power of eminent domain.

The nature of the use to which defendant may devote its own property, places upon it no duty to institute proceedings by condemnation to assess damages. It is true that if a corporation or an individual is threatening to occupy, appropriate, or do actual physical damage to private property against the owner's will, for a use and in a manner which would only be lawful through an exercise of the right of eminent domain, such act comes within the constitutional inhibition, and may be enjoined by a court of equity on the broader grounds hereinbefore stated. But when such corporation owns its property, and may enter upon and occupy and improve it without becoming in any sense a trespasser, the Constitution does not forbid such acts, and relief by injunction could only be obtained under the same conditions which would warrant such relief between other owners of abutting or adjacent property. This principle has been given much broader application than is necessary on the facts in this case. In the case of Vanderburgh *v.* City of Minneapolis, 93 Minn. 81, 100 N. W. 669, the city attempted to vacate a street adjacent to plaintiff's lots, and an injunction action was brought to restrain the city in its proceeding, and a railway company owning adjacent property from occupying such street. The court says: "Plaintiff's theory of the case in this respect is that, by the recent amendment to the state Constitution, plaintiff is entitled to damages for the vacation of the streets in question, even though they did not abut upon his property, and that, as no damages were assessed or allowed him by the city council, its action in vacating the streets is null and void, and the railway company may be restrained and enjoined from taking possession thereof. The Constitution, prior to the amendment, provided that private property should not be taken for public use without just compensation therefor first paid or secured.

The amended Constitution provides that private property shall not be taken or damaged for public use without compensation. Conceding, with plaintiff, that the vacation of the streets in question damaged his property, and that under the amended Constitution he is entitled to compensation, it does not necessarily follow from that fact alone that he is entitled to an injunction restraining the railway company from taking possession of the vacated streets. If he is entitled to damages, as claimed, he can maintain an action against the railway company to recover the same. It is elementary that an injunction will not lie to restrain the doing of an act where there is a speedy and adequate remedy at law. An action against the company for damages or in ejectment would afford plaintiff full and complete redress, and if it be conceded, as suggested, that he is entitled to damages in a case of this kind, his remedy is one at law, and not in equity."

We are not now called upon to determine what particular damages may be recovered in an action at law or in condemnation proceedings, nor do we hold that only such damages are recoverable, as may result from an actual appropriation of, or actual physical injuries to, property. The question before us is whether we shall enjoin a railway company from making improvements upon its own property without first proceeding, by a condemnation action, to assess and pay consequential damages, when such damages are already accrued, and a plain, speedy, and adequate remedy exists in an action at law. In Searle *v.* City of Lead, supra, the anticipated damage to plaintiff's freehold was direct and not consequential. It was threatened, and not consummated. It was an injury by a threatened act of the city which necessarily involved an exercise of the right and power of eminent domain, because the city could make the improvement contemplated only by a direct exercise of that power. These considerations disclose the broad distinctions between that case and the one at bar. We approve the rule there announced, and are not to be understood as modifying it in any degree, as to the remedy invoked in that case. The question here is only as to the proper use of the remedy by injunction upon the facts before us. The cases of Rigney *v.* City of Chicago, 102 Ill. 68, and Railroad Co. *v.* Ayres, 106 Ill. 518, were both actions at law to recover damages under constitutional provisions similar to our own. And while these two cases have no direct bearing on the question before us, it may be noted that relief was there sought in actions at law, and not in equity. But in the case of Rigney *v.* City of Chicago, supra, the court says: "The case of Stetson *v.* Chicago & Evanston R. R. Co., 75 Ill. 74, is relied on for the same purpose. The question presented by that case was whether, where a railroad company, under authority from a city, has located its track upon a public street, a

bill in equity will lie at the suit of an owner of lots abutting on the street to restrain the company from operating its road until the damages claimed to have been done to the lots by reason of the construction and operation of the railway are ascertained and paid, and it was held that such a bill would not lie, but that the party would be left to his action at law for whatever actual damages he may have sustained; the court having held that where there has been no actual taking of property, and the company has constructed its track under authority from the city, chancery has no jurisdiction. What was said with respect to the character of the injury was not at all necessary to a decision of the case, and must be regarded as mere obiter. But even if this were not so, all that is there said may be harmonized, in the manner we have stated, with the previous and subsequent decisions of this court upon that question."

In the case thus commented upon, the court says: "In Hall et al. *v.* People, 57 Ill. 307, it was held no man could be compelled to part with his property without just compensation, and that no corporation, public or private, could rightfully appropriate private property to its own use without first tendering or paying the damages assessed under the forms of the law. A party ought not to be driven to an action against a corporation responsible or irresponsible for his damages. This would be to take his property without first making compensation, and would be a plain violation of a constitutional right. But the damages alluded to are such direct damages as are incident to or naturally flow from the taking of private property for public uses. No allusion is made to, nor can the principles of that case be applied to consequential damages not the result of taking private property. It was never intended to apply the principle to the latter class of cases. English statutes contain provisions, in substance, the same as the statute we are considering, and have been the subject of judicial construction. A leading case is Hutton *v.* London & S. W. R. W. Co., 7 Hare, 26. It was ruled in that case, in the event of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands or upon the lands of another party, and for which compensation is required to be made by section 6 of the Railway Clauses Consolidation Act (8 Vict. c. 20), it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained, paid, or deposited. Under the Land Clauses Consolidation Act (8 Vict. c. 18), in case of purchasing land, or damage directly consequent upon the purchase, the act is explicit. The damages in the latter case must be ascertained, and both price and damages must be paid before entry, but in regard to damages given by 8 Vict. c. 20, to one person, consequential upon

the exercise of the powers of the company upon its own land or upon the land of other persons not complaining, a different rule prevails. The doctrine of Lester *v.* Lobley, 7 A. & E. 124, cited by the Vice Chancellor is that it is not unlawful for the company to commence work within its powers, which might be attended with damages to others, before making compensation for such expected damages. The reason given is the impracticability in many cases of knowing whether damage will be sustained or not, and of measuring it if it were certain. Upon the authority cited, the conclusion of the court in Hutton *v.* London & Southwestern Ry. Co. was the acts of the company in proceeding to construct its works within its powers without first making compensation to the party claiming to have sustained consequential damages thereby were not unlawful, and hence there was no ground for the interference of a court of equity. Our statute, to provide for the exercise of the right of eminent domain, admits of the same construction. Where lands have been taken for public use, the value of the land itself, and such damages as result directly from the taking to other lands of the owner not actually taken, must be assessed, and both price and damages paid or tendered before the right of entry exists, but where the damages are consequential upon the entry of the company upon its own lands, or upon the lands of others not complaining, the rule is different. The company, in the latter case, is not bound to make compensation for expected damages before entering upon the work it has a lawful right to do under the powers conferred by its charter. The party will be left to his action. When he has settled the question of his right to damages, and ascertained the measure in an action at law, if any reason exists why he cannot have execution of the same, equity will assist him, but not before. Dunning *v.* City of Aurora, 40 Ill. 481; Bliss *v.* Kennedy, 43 Ill. 67. Holding, as we do, there is no ground for the interference of a court of equity, it will not be necessary to discuss any other question in the case. The injunction was properly denied, and the decree dismissing the bill will be affirmed."

In the case of P. & R. Ry. Co. *v.* Schertz et al., 84 Ill. 135, that court also uses the following language: "As we have seen, the fact a party has or might sustain injury indirectly constitutes no valid reason why a corporation may not enter upon its own lands, or upon lands of others in which he has no interest, to construct a railway or other public improvement. That is this exact case. The objectionable track is constructed wholly in the street, the fee of which is conceded to be in the municipal corporation granting the license. No property of complainants has been taken for public uses, nor is there any reason for condemning any portion of it. And if the owners have sustained any damages as a result from what the railroad company has done, under its charter, on other lands under a license from the

owner of the fee, redress can be had in an appropriate action at law. Such cases can be referred to no general head of equity jurisdiction. As was said in Stetson *v.* Chicago & Evanston Railroad, supra, the party complaining will be left to his action at law. When he has settled the question of his right to damages, and ascertained the measure, if any reason exists, as, on account of insolvency, why he cannot have execution of the same, equity will then assist him by injunction or otherwise, but not before." See, also, Krone *v.* K. C. E. R. R. Co., 50 Hun, 431, 3 N. Y. Sup. 149.

We hold, therefore, that upon the facts presented in this case the plaintiff was not entitled to injunctive relief, and the judgment and the order denying a new trial are affirmed.

McCOY, J., took no part in this case.

RIEDEL et al. *v.* WEST JERSEY & S. R. Co.

(Circuit Court of Appeals, Third Circuit, February 21, 1910.)

[177 Fed. Rep. 374.]

Negligence—Dangerous Premises—Trespassers.*—Though the owner of premises is not bound to guard or protect a trespasser from dangers lurking thereon, he is liable for an injury to the trespasser, if willfully inflicted.

Electricity—Electric Third Rail—Injury to Trespassers.†—Defendant's railroad was equipped with the third-rail electric system; the rail carrying the power being similar to and parallel to the other rails. The rail was not covered or protected, except at crossings and stations, and normally carried 675 volts, which was sufficient to injure or kill a person coming in contact therewith. Plaintiff was between seven and eight years old, and while playing in the back yard of the house of friends he was visiting, which abutted on the right of way, was attracted by flowers growing on the far side of the rails, whereupon plaintiff's companion opened the gate in the right of way fence and started to pluck the flowers. Plaintiff in some manner fell on the

*For the authorities in this series on the subject of the duties and liabilities of a railroad company with respect to licensees and trespassers on its premises, see Rowley *v.* Chicago, etc., Ry. Co. (Wis.), 30 R. R. R. 732, 53 Am. & Eng. R. Cas., N. S., 732; foot-note of Watson *v.* Manitou, etc., Ry. Co. (Colo.), 29 R. R. R. 363, 52 Am. & Eng. R. Cas., N. S., 363.

†For the authorities in this series on the subject of the care due trespassing children from railroad companies, see second foot-note of O'Bannion's Adm'r *v.* Southern Ry. (Ky.), 30 R. R. R. 416, 53 Am. & Eng. R. Cas., N. S., 416; foot-notes of Wheeling, etc., R. Co. *v.* Harvey (Ohio), 29 R. R. R. 218, 52 Am. & Eng. R. Cas., N. S., 218.

rail and was shocked and burned, receiving permanent injuries. Held, that there was no implied invitation or license by defendant to children to enter the premises, and that defendant owed plaintiff no duty to cover the rail, nor did the facts show willful injury.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Louis Riedel, by his father and next friend, John M. Riedel, and John M. Riedel in his own right, against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

See, also, 170 Fed. 816.

Evans and *Forster,* for plaintiffs in error.

John Hampton Barnes, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

GRAY, Circuit Judge. The writ of error in this case brings up from the court below a record disclosing the following facts:

Louis Riedel, who by his father and next friend brought suit in the court below, was a boy between seven and eight years of age, and was permanently injured by falling across the electric third rail of the West Jersey & Seashore Railroad Company, the defendant.

The day the injury occurred, he had been taken by his parents from Philadelphia, where they resided, to spend the day with some friends, the yard of whose house abutted against the line of the right of way of said defendant company, just above the village of Westfield, N. J. The right of way of the defendant company near this point, as well as elsewhere, was fenced with a three-strand wire fence, about four feet high, but at the premises in question there was a picket fence dividing the same from the right of way of the defendant company, about five feet in height, which served as part of the line fence of said company, the wire fence coming up to and ending at each end of this picket fence. In this picket fence was a gate opening onto the defendant's right of way.

The defendant company was originally chartered as a steam railroad, but, by the revision of the act of the Legislature of New Jersey concerning railroads, in 1903, the power was conferred upon it to substitute for steam any other motive power which it might deem best adapted to the economical operation of its railroad, and to use such devices and appliances for conducting and distributing power as might be required. Accordingly, at the time of the accident, and for a considerable period prior thereto, the company had installed an electric system for the operation of its road, the electricity being conveyed from the power house through what is known as a "third rail." This rail was situated between the two tracks upon which the cars traveled, but was in close proximity to the rail on one side and

ran parallel therewith. It was in all respects like the rail which carried the cars and was without cover or protection of any kind, so that, to a casual observer, there was nothing to distinguish it in appearance from the other rails. The current of electricity carried by this third rail was normally 675 volts, a charge sufficient to seriously injure or even destroy the life of any one coming in contact therewith. This road ran entirely across the state of New Jersey, from Camden to Atlantic City, a distance of some 60 miles. At stations and road crossings, the third rail was covered, so that persons using said stations and crossings were protected therefrom; but, with these exceptions, throughout the entire length of the road, the third rail was uncovered.

On the day of the accident, the plaintiff, Louis Riedel, with two companions of about the same age, a boy and a girl, were playing together in the back part of the lot above described. What then occurred is thus stated:

"Looking through the fence, they saw and were attracted by some flowers growing on the other side of the rails, and went to the gate to open it. Finding it fastened, the plaintiff's companion, as he testified, 'put a nail or a piece of wood, then pulled it out again, and it came open.' Having thus unbolted the gate, the two started to pluck the flowers. The first boy crossed the tracks in safety, but the plaintiff fell, apparently having tripped over something, and, coming in contact with the third rail, was shocked and burned by the electric current, sustaining severe and permanent injuries."

Upon these facts, the court directed a verdict for the defendant, and upon exceptions to this charge of the court, the case comes before us upon two assignments, alleging error in this action of the court. The facts are simple and undisputed, and the single question for our determination is, whether or not the defendant company owed a duty to the plaintiff to use such care in guarding and protecting this third rail as would have prevented the injury which happened to him, or, as more generally put by the defendant—is a property owner, who maintains on his premises a dangerous agency in the proper exercise and use of his premises, responsible to a child trespassing thereon who is hurt by contact with such agency, if there is nothing about it to entice or attract him, and where the owner has done nothing to invite such trespasser on his premises, or has any reason to expect that he will come upon them?

The exceeding danger presented by the "third rail," which has recently come into use in the operation of important electric roads, when such rail is uncovered and exposed, justly challenges our attention. The character, however, of this dangerous and death-dealing agency must not be allowed to obscure the well-settled principles by which the duty of the owner of

premises, upon which such dangerous agency or instrumentality is situated, with respect thereto, is to be determined.

The plaintiff was a trespasser, and it must therefore appear, in order that he may recover from the defendant, that his case is an exception to the ordinary and well-settled rule, that the owner of premises owes no duty to a trespasser, whether an infant or adult, to keep such premises in a nonhazardous condition, or to protect him against concealed dangers lurking thereon. The contention of plaintiff's counsel, urged with much ability and insistence, is that the extreme danger arising from the exposed third rail was a concealed danger, by reason of the fact that the third rail, in size and appearance, was undistinguishable from the other rails by a boy of the immature age of the plaintiff, there being no evidence that he had been informed or in any way made aware of the character of such rail. It is therefore contended that the maintenance of this instrumentality argued such a wanton recklessness as to consequences on the part of the defendant, and willingness to inflict injury, as would render it liable to the plaintiff, even though he were technically a trespasser. Of course, though the owner of premises may owe no duty to guard and protect a trespasser from dangers lurking thereon, he has no right willfully to inflict injury on such a trespasser. It is on this ground that the so-called "spring gun" cases have been decided. Whether the conduct of such owner, in maintaining a dangerous situation or instrumentality on his land, would amount to such a wanton and reckless indifference to consequences as would imply a willingness to inflict an injury on a trespasser, must depend upon the circumstances of the case. There is a class of cases well known, in which it is held that a railroad company is liable, where its servants in charge of moving trains willfully run down a person in full view upon its tracks, even though they have given warning of their approach, and even though such person be a trespasser. Such cases serve to illustrate the proposition, that one may not willfully injure even a trespasser upon his premises. Of this class are the cases referred to by the counsel for plaintiff. Chicago Transfer R. Co. *v.* Gruss, 200 Ill. 195, 65 N. E. 693; Chicago Transfer R. Co. *v.* Kotoski, 199 Ill. 383, 65 N. E. 350; Lafayete, etc., R. Co. *v.* Adams, 26 Ind. 76.

But these decisions do not support the contention, that the mere maintenance of a dangerous instrumentality upon one's land for ordinary and lawful purposes, and incident to its natural use in carrying on a lawful business, makes such a one a willful tort-feasor with respect to a trespasser who has come within its danger. In the present case, there was nothing willfully injurious in the defendant's installing upon its own premises this third rail, dangerous though it was to those who came in contact with it, for the lawful purpose of operating an

electric railway system, nor can we say from that fact alone, or from any other evidence in the case, that the nonprotection of the third rail was such a wanton and reckless indifference to consequences as would legally imply willfulness and intentional wrong, as to any injury that might be occasioned thereby, whether that injury was suffered by an infant or an adult. There is nothing in the case from which the purpose to inflict injury can be referred, as in the "spring gun" cases, or willful indifference to consequences, as in the railroad cases above referred to. One's right to maintain for a lawful purpose a dangerous appliance or instrumentality on his own premises, is not limited or qualified by the degree in which it may be dangerous.

The precise question here involved has recently been decided by the Supreme Court of New Jersey, in the case of Sutton against the defendant in the present case. 73 Atl. 256. The facts were practically the same. The action was for the death of a child 13 years of age, who, in crossing the tracks of the defendant at a point other than a public crossing or station, came in contact with a third rail charged with electricity, and was killed. It was conceded that the decedent had no legal right to go upon defendant's premises at the point where he crossed the tracks. The court below sustained a demurrer to the declaration, and gave judgment for the defendant. The Supreme Court affirmed that judgment, saying:

"The real distinction running through the cases seems to me to be this:

"Where the landowner in the development of his property, and solely for the purpose of obtaining a more beneficial user therefrom, installs upon it an appliance which will be dangerous to people coming in contact with it, he is under no obligation to trespassers to so guard it that they shall not be injured; but where he installs the appliance for the purpose of inflicting injury upon the persons or property of those who unlawfully come upon his land, he is liable when harm is inflicted by such appliances. * * *

"The right of the plaintiff, therefore, depends upon whether the defendant company owes to a trespasser upon its right of way the duty of using care either to safeguard its third rail in such a way as to prevent him from coming in contact with it, or else of giving him notice that such contact is dangerous to life and limb. The rule is settled in this state that a landowner is under no obligation to a trespasser to keep his premises in a nonhazardous state; that, as to him, the landowner's sole duty is to abstain from acts willfully injurious. And this rule is applicable whether the trespasser is an infant or an adult.

"In the case in hand, the defendant installed the electric third rail system for the more complete beneficial use of its property. In doing so it acted under legislative sanction. * * *

"Having the lawful right to install this system for the operation of its road, it was within the protection of the rule which we have been discussing, and was under no obligation to the deceased except to abstain from acts willfully injurious to him. That it failed in this obligation is not suggested in the declaration."

There is nothing in the record to bring this case within the ratio decidendi of the so-called "turntable" cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case, the railroad property was guarded by a statutory fence, and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened by a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon the railroad premises through this gate, or otherwise, for play or amusement, or for any other purposes. The motive of the children in attempting to cross the railroad, as testified by the children themselves, was to gather flowers growing on the other side of the railroad property. The present case, therefore, differs obviously from the cases referred to, the decisions in them being founded upon the maintenance of a dangerous appliance or object on the owner's premises which presented enticement and allurement to children, and to which they were in the habit of resorting, to the knowledge of the defendant. There was thus an implied invitation or license to the children to enter upon the premises, by reason of which they were divested of the character of trespassers, and there was imposed upon the defendants the duty of exercising reasonable care for their protection. Railroad Company *v.* Stout, 17 Wall. 657, 21 L. Ed. 745; Snare & Triest Co. *v.* Friedman, 169 Fed. 1, 94 C. C. A. 369; Cooke *v.* Midland Great West Ry. of Ireland, L. R. App. Cas. 1909, pt. 2, 229.

However deplorable these cases may be, we cannot, in order to remedy them, disregard those well-settled principles which have heretofore regulated and limited the restraint imposed upon landowners in the use of their own premises. If the comparatively recent use of the third rail has developed dangers to the public at large hitherto unknown, the Legislature of the state may feel called upon to exercise its undoubted police power, by imposing upon the users of these instrumentalities such precautions in their use as will measurably afford protection to those coming within their danger.

The judgment below is affirmed.

LOUISVILLE & N. R. Co. *v.* MORGAN.

(Supreme Court of Alabama, Jan. 20, 1910.)

[5 So. Rep. 827.]

Railroads—Injuries to Licensees.*—Plaintiff, who went to defendant railroad's station for freight, drove upon an elevated wagonway beside the station platform; and one of his mules, becoming frightened, shied and pushed the wagon and other mule off the platform, injuring plaintiff. There was no railing along the platform. Held that, while the railroad was not an insurer, plaintiff was entitled to the protection of a railing, and, if its absence was the proximate cause of the injury, the railroad was liable.

Railroads—Injuries to Licensees—Contributory Negligence.†—The mere fact that plaintiff knew of the condition of the premises, and, so knowing, used the defective way provided for him, did not render him guilty of contributory negligence.

Appeal and Error—Harmless Error—Rulings on Demurrer.—No injury was done appellant by the sustaining of demurrers to certain pleas, where the same defense was had under pleas to which demurrers were overruled.

Railroads—Injuries to Licensees—Question for Jury.—Where plaintiff, who went to defendant railroad's station for freight, drove upon an elevated wagonway beside the platform, which way had no railing, and was injured, owing to one of his mules becoming frightened and pushing the wagon off the way, the questions of negligence and contributory negligence were for the jury.

Appeal from Circuit Court, Wilcox County; B. M. Miller, Judge.

Action by John T. Morgan against the Louisville & Nashville Railroad Company. From a judgment in favor of complainant, defendant appeals. Affirmed.

George W. Jones and *E. N. & P. E. Jones,* for appellant.
Miller & Bonner, for appellee.

MAYFIELD, J. The appellant is a railroad company, having a platform and warehouse at Pineapple Station, from which goods transported to that point were delivered to wagons, which were driven upon the incline of a raised wagon way

*See first foot-note of preceding case.

†For the authorities in this series on the subject of the care required of a licensee for his own safety, see second foot-note of Teakle *v.* San Pedro, etc., R. Co. (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18; last foot-note of Norfolk, etc., Ry. Co. *v.* Denny's Adm'r (Va.), 26 R. R. R. 124, 49 Am. & Eng. R. Cas., N. S., 124; third head-note of Rich *v.* Chicago, etc., R. Co. (C. C. A.), 26 R. R. R. 1, 49 Am. & Eng. R. Cas., N. S., 1.

erected by the side of the platform and warehouse, and, when loaded, would be driven down a like incline to the ground. One side of this way was against the side of the depot platform, which was walled up so as to form an inner railing to the wagon way, which was five feet high, nine feet wide, and without railing on the outer side. Appellee sued appellant for damages for personal injuries received from neglect of appellant in the construction of this wagon way.

The fifth and sixth counts, on which the case was tried, alleged that appellee went with a two-mule team for freight at the depot, and that he drove up this wagon way, and after loading started to drive down the other incline to the ground along the side of the platform, when his inner mule became frightened at the cracks in the planked-up wall of the basement, serving as a railing to the platform, and shied away from the inner side of the platform, and pushed the outer mule and wagon off the track, throwing appellee to the ground, and seriously injuring him. These cracks are alleged to have been of stated dimensions, and to have been such that horses could look through them and see under the platform, and that they were calculated to frighten ordinarily gentle animals; and it is alleged that plaintiff's injuries resulted from the neglect of the defendant in leaving the cracks in the wall of the basement forming the inner railing of the platform, and in not having an outer railing thereto. These counts were demurred to, and the demurrers were overruled, and this ruling is assigned as error.

It is insisted the plaintiff below was guilty of contributory negligence in going on the platform, that the negligence complained of was not the proximate cause of the injury, and that the plaintiff's team was the proximate cause of the injury. The plaintiff alleges that his inner mule shied at the cracks, and pushed the wagon and the other mule off the platform on the outer side, where there was no railing, and that it was a negligent construction not to have an outer railing. This, we think, is sufficient.

It is argued that the shying of the inner mule was a freakish act, unlikely to occur, and that it was consequently not negligence to leave the cracks in the wall. Railings are intended for the purpose, among others, of safeguarding the way against the unusual, as well as the more ordinary and common, occurrences. While the defendant below was no insurer, and may not have been liable merely for the shying of the mule, nevertheless the plaintiff was entitled to the protection to be afforded by an outer railing under the circumstances. It was the duty of the defendant to provide such a railing, and if its absence was the proximate cause of the injury, as alleged, defendant would be liable. Village of Carterville *v.* Cook, 129 Ill. 152, 22

N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; Joliet *v.* Verley, 35 Ill. 58, 85 Am. Dec. 342; Gonzales *v.* Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17, and notes; Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 23 Atl. 594, 14 L. R. A. 743, 30 Am. St. Rep. 741; Gibney *v.* State, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690.

We hold that there was no error in overruling the demurrers to the fifth and sixth counts, as last amended. The counts were amended, evidently, to meet the requirements laid down by this court in Sides' Case, 122 Ala. 594, 26 South. 116; and if subject to the demurrer as originally filed, their infirmities were cured by the amendments, and no injury could result to defendant by the overruling of the demurrers to the original counts.

It is next insisted that the court erred in sustaining the demurrers to the special pleas interposed to the fifth and sixth counts. These pleas, in various forms and phraseology, attempt to set up contributory negligence as the proximate cause of plaintiff's injury. The pleas of contributory negligence, as to which demurrers were sustained, were bad, and were subject to the demurrers interposed thereto. The mere fact that the defects in the way were open to ordinary observation is not sufficient. The mere knowledge of a defect is not, of itself, contributory negligence; but the fact, and the use made, of the knowledge, by a plaintiff, are circumstances to be considered on the subject. It has been repeatedly held in this state that it is not contributory negligence per se for one who knows of defects in a highway to persist in traveling over it. See cases collected in 4 Mayfield's Dig. p. 309, subd. (b) 2.

The most that any of these pleas can be said to allege is that plaintiff knew or ought to have known of the defect, and with such knowledge and notice used the defective way provided by defendant for him. This alone is not sufficient to render him guilty of contributory negligence. He was invited by the defendant to use the way or bridge in its then condition, and, moreover, so far as appears, it was then in the same condition as when originally constructed by the defendant for the use of the public, its patrons, one of whom was the plaintiff, in this particular use of the platform.

Furthermore, the assignments of error as to rulings on the demurrers are in groups, as to several pleas, some one of which was palpably bad, and also as to which practically the same defense was had, under the pleas as to which the demurrer was overruled, as could have been had under these pleas; hence it affirmatively appears that no injury was done defendant.

The questions as to the negligence of defendant under each count, and the contributory negligence of plaintiff under each

plea, were properly submitted to the jury; hence there was no error in refusing the affirmative charges requested by the defendant.

The judgment of the circuit court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MCCLELLAN, JJ., concur.

NORRIS *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, May 4, 1910.)

[67 S. E. Rep. 1017.]

Railroads—Travelers on Highways—Negligence.*—A person traveling on a highway so close to a railroad track and in such a position that the approach of a train should be adverted to in the exercise of reasonable care for his own safety may rely to some extent on the signals to be given by trains at public crossings and other points where signals are ordinarily required, and a failure of trainmen to give proper signals at such points is ordinarily evidence of negligence, and, where such failure is the proximate cause of an injury, it is in some circumstances actionable negligence.

Railroads—Injuries to Person on Track—Negligence.*—A person who is on a railroad track at a place where travelers are habitually accustomed to use the same for a walkway may rely to some extent on signals to be given by trains at points where signals are usually required, and the failure of the trainmen to give signals at such points is ordinarily evidence of negligence, and, where the failure is the proximate cause of injury, it is under some circumstances actionable negligence.

Railroads—Injury to Persons on Track.—It is negligence for a railroad to run an engine and tender backwards at night at a high speed

*For the authorities in this series on the question whether a person injured through the negligence of another had the right to assume that the latter had or would perform the duties owing to the person injured, or whether it was the duty of the injured person to anticipate negligence on the part of the person by whose conduct he was injured, see third foot-note of Norfolk & P. T. Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; last foot-note of Keefe *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725; first foot-note of Rundgren *v.* Boston & N. St. Ry. Co. (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685.

For the authorities in this series on the question whether it is actionable negligence to have failed to give crossing signals where a person was struck by the train at a point beyond the crossing, see foot-note of Lynch *v.* Great Northern Ry. Co. (Mont.), 32 R. R. R. 672, 55 Am. & Eng. R. Cas., N. S., 672.

through a thickly settled community where a large number of persons are accustomed to use the track as a walkway, without giving signals at public crossings and with only a lantern in front of the tender throwing light along the track for only 10 or 15 feet, and, where a person on the track is injured in consequence thereof, actionable negligence may be inferred.

Railroads—Injury to Person on Track—Negligence.—In an action for injuries to a person struck by an engine, evidence held to warrant a finding of negligence of the railroad in the operation of the engine.

Negligence—Contributory Negligence.†—Where one is suddenly subjected to imminent peril through another's negligence, either a comrade or a bystander may attempt to save him, and his conduct in so doing is not subject to the rules of ordinary situations, and the contributory negligence of the imperiled person does not affect the question as between the wrongdoer and the comrade or bystander who may extend the help which the occasion requires without being charged with a wrong, and full allowance must be made for the emergency presented.

Railroads—Injuries to Persons on Tracks—Contributory Negligence.†—Where a railroad negligently ran an engine and tender backwards at night at a high speed through a thickly settled community, where a large number of persons are accustomed to use the track as a walkway, and where two persons were on the track, the act of one in attempting to save the other on discovering the peril was not contributory negligence as a matter of law.

Appeal from Superior Court, Harnett County; W. R. Allen, Judge.

Action by R. B. Norris against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence on the part of plaintiff which tended to show that on the night of June 4, 1906, plaintiff, with a comrade, one J. H. Stewart, left the village of Benson, a station on defendant's road, and was walking along the track towards Dunn; that they left Benson about 10:30 p. m., just after the regular train had passed, and at a point about 2¾ miles from Benson Stewart said, "Let's rest," and sat down on a cross-tie with his head a litle dropped; that while Stewart was so placed, and plaintiff was standing across the track near the ties, an engine and tender of defendant company approached, the tender being in front as it was moving; that the engine was off schedule, going down the road to relieve a passenger train, which had been disabled and was waiting on the track some distance away; that

†Second foot-note of Wilson *v.* New York, etc., R. Co. (R. I.), 29 R. R. R. 135, 52 Am. & Eng. R. Cas., N. S., 135.

it had a lantern in front of the tender, which gave light, throwing a light on the track for 10 or 15 feet in front as it was moving; that there were several public crossings back of them, one of them a very much used crossing about 250 yards away, and another 245 yards ahead, that there were also two whistle posts near, the point being in the vicinity of Mingo, another station on the road; that, when plaintiff realized it was a train, he called to Stewart, and then jumped across the track to pull him off, and in the effort to save him they were struck by the engine, and Stewart was killed and plaintiff badly injured; that it was a thickly settled community where people were much accustomed to use the track, and the engine approached running very rapidly and without giving any signals. Plaintiff testified that he saw the light on the tender in time to have saved Stewart, but did not realize it was a train till he called. There was a signal statement by plaintiff, introduced by defendant, which had been made shortly after the occurrence, and tending, in some respects, to contradict his statement.

Some of the evidence pertinent to the issues is set out in the record as follows:

Plaintiff testified: "I and J. H. Stewart were coming from Benson on June 4, 1906. We left Benson about 10:30 at night, and traveled 3 or 3½ miles. We left after the shoofly and traveled on the railroad. Stewart sat down and said, 'Let's rest.' We had passed several crossings. Stewart sat down near a footpath, on the right side, on the end of a cross-tie, with his head a little dropped. I was standing on the east side of the track, at the end of the cross-tie. I saw a light and heard the train. Stewart did not notice it, and I jumped and caught him, and the train knocked me loose. I thought it was a box car in front, or an engine and tender running backwards. The light showed to be like a lantern. It threw a light 10 or 15 feet in front. I could see the light a good ways off. It was dim. I saw the light far enough off to have saved Stewart and myself, but did not know it was a train, and heard no bell or whistle. The train made very little noise, and was running very fast. Everybody travels the railroad, night and day. It is a thickly settled community. All use it as a public footpath. There is a crossing 250 yards back towards Benson, and in front about 245 yards. We were 180 steps from a whistle post. Cannot tell what happened for a short time after I was struck. Part of the time I was sensible and part of the time not." And on cross-examination the witness said: "I had taken one drink. I saw Stewart take one drink. He appeared sober. I had a pint of whisky with me; took one drink on the way. It took us 40 or 45 minutes to go from Benson to place where I was hurt. When I saw the light and heard the train, I was standing near the end of the ties. I called to Stewart. He did not notice me, and I jumped across

to pull him off. I do not know whether or not the train struck Stewart. I was under the influence of drug when I signed paper for W. H. Pope. I get about same wages I did before."

Jesse McLamb, witness for plaintiff, testified as follows: "I live between Dunn and Benson. I was going home from McLamb's; had been taking some bee-gums. The shoofly passed, and we started home. I was in some 50 yards of home and heard the roar of the train. It was going backwards; had a glimmer of light. I heard no whistle or bell. As I got home clock struck 11. The train was going mighty fast—as fast as I ever saw one run. There is a public crossing before you get to the trestle, another after you pass, and at my house still another. Stewart's body was 200 or 300 yards from crossing at my house. Went to see Norris in two or three weeks. He was in bed, and seemed to be suffering. People walk the railroad more than the county road. The community is thickly settled, has been so used ever since built, 30 years or more. There is a great deal of foot travel along this part of the track, both day and night."

W. L. Stewart testified: "Got to railroad and saw glimmering light. It was very little, and I took it to be a switch light. Almost by the time I got off the track the train passed; no whistle or bell. It looked like an engine and tender running backwards, and was running very fast. The railroad is traveled a great deal, day and night, by pedestrians. Saw Norris next morning; did not appear to know anything. He was suffering. He was feeble a long time. There are two whistle posts near the place the injury occurred. The nearest crossing is 200 or 300 yards towards Benson, and is used a great deal by the public."

Nazro Stewart, witness for plaintiff, gave substantially the same testimony as W. L. Stewart, and said he "saw a dim light that looked about like a star; that train consisted of an engine, running backwards, with tender in front. No whistle or bell sounded; train making very little noise, and was running very fast. We hardly had time to clear the track before it passed. This part of track is used a great deal by the public as a footway."

J. A. Stewart witness for plaintiff, testified: "There has been a crossing near this place since I can remember. Railroad is used as a footpath; thickly populated community, and the railroad is used as a footway a great deal, both day and night."

A. W. Stewart, witness for plaintiff, testified: "I was sitting on my piazza, 150 yards from railroad, about 11 o'clock at night. Engine and tender passed, running backwards. It had a little light in front; was running very fast; heard no signals. The train was running as fast as I ever saw one."

Among other witnesses for defendant, Capt. Bullock testified: "I was engineer on engine and tender, was running as a

second section of 31, and 20 minutes behind it at Benson. Shoofly left Benson at about 11: 15. We were running 20 miles an hour. Six trains passed this point that night. I saw no one. We had a headlight on rear and lantern on tender, running backward. I tried to ring bell at all crossings and blow whistle; cannot say positively as to this one. It was equipped as engines usually are when running backward. I was going to Wade, N. C., to the relief of a through passenger train which was disabled and waiting."

And Capt. Howie, witness for defendant, testified: "I was conductor on this train. We did not make schedule on account of running backward. [Testimony as to equipment same as witness Bullock.] We were going to Wade, N. C., to the relief of a through passenger train which was disabled and waiting. I told Capt. Goodrich, the section master, that we came near striking some people that night, as I saw some persons right close to the track. We were running fast, but I cannot say how many miles per hour; cannot say as to whether signals were given for crossings."

The jury rendered the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant? Answer: Yes.

"(2) Did the pliantiff by his own negligence contribute to his own injury? Answer: No.

"(3) What damage is the plaintiff entitled to recover? Answer: $1,500."

Judgment for plaintiff, and defendant excepted and appealed, assigning for error the refusal of the court to dismiss as on judgment of nonsuit.

J. C. Clifford, for appellant.
R. L. Godwin and *E. F. Young,* for appellee.

HOKE, J. (after stating the facts as above). It has been repeatedly held with us that where a person is traveling along a highway so close to a railroad track, and in such a position, that the approach of a train should be adverted to in the exercise of reasonable care for his own safety, or where a person is on the track at a place where travelers are habitually accustomed to use the same for a walkway, they have a right to rely to some extent and under some conditions upon the signals and warnings to be given by trains at public crossings and other points where such signals are usually and ordinarily required, and that a failure on the part of the company's agents and employees operating its trains to give proper signals at such points is ordinarily evidence of negligence; and, where such failure is the proximate cause of an injury, it is, under some circumstances, evidence from which actionable negligence may be inferred.

An instance of the first proposition will be found in the case of Randall *v.* Railroad, 104 N. C. 410, 10 S. E. 691, where plaintiff was driving an ox team at a point very near the track, importing menace to the safety of the team, and where an injury in fact resulted, and testified that he would not have driven the team into the dangerous place if he had been properly and adequately warned by the signal whistle at the station or crossing, some distance ahead. In that case, as relevant to the question presented, the facts and the legal principle applicable are summarized and stated by Associate Justice Avery, delivering the opinion, as follows: "The train passed at an unusual hour along a narrow canyon, where the wagon road ran, at some points, close beside defendant's track, and at others diverged a little distance from it. The plaintiff had passed the station and then gone over a crossing, near which the wagon road, for a very short distance, was located in the narrow space between the mountain and the track, when he heard a slight blow from the engine, and, almost immediately, it passed around a curve on the mountain, only 60 or 70 yards ahead of him, and the noise and blazing headlight so frightened the oxen that, in attempting to get out of the way, three of them jumped upon the track and were killed. This occurred less than six months before the action was brought. The plaintiff further testified that if the regular station blow, or the crossing blow, had been given at the usual point, he could have stopped his oxen behind a large pile of wood before he reached the narrow place, and could have saved them, but that, because the blow was not given, he had advanced to the place where on the one side was the steep mountain and on the other the track of the railroad company. The engineer testified that he blew the station blow, and as loud as usual, and at the usual place. On the decision of the issue of fact thus raised the whole controversy depends. Troy *v.* Railroad, 99 N. C. 298 [6 S. E. 77, 6 Am. St. Rep. 521]. When a person in charge of a wagon and team approaches a public crossing, it is his duty to look and listen and take every prudent precaution to avoid a collision, even though the approach be made at an hour when no regular train is expected to pass. The same degree of care and caution should be exercised by one who is about to drive into such a narrow and dangerous pass as is described by the witnesses if he would avoid the responsibility for any injury that may result from his carelessness. But it is the duty of the engineer to blow the whistle or ring the bell at a reasonable distance from such a crossing as was described by the witnesses, in order to give warning to travelers on the ordinary highway running across and near it, and enable them to guard against danger. It is always required of an engineer, if he would relieve the company from liability for negligence, to blow the whistle as a warning at a reasonable distance

from the crossing of a public highway, or a station, which his train is approaching, and is doubly important where the track winds around curves, between a mountain and river, by the side of a public road; and, if travelers on such highway are subjected to loss by injury to their live stock at a crossing or narrow pass like that described by the witnesses in consequence of his failure to give such warning as they had a right to expect, the company is liable in damages for such negligence. 2 Wood's R. L. p. 323; Kelly *v.* St. Paul & C. Railroad Co., 29 Minn. 1 [11 N. W. 67]; L. C. & C. Railroad Co. *v.* Goetz's Adm'x, 79 Ky. 442 [42 Am. Rep. 227]; Penn Co. *v.* Krick, 47 Ind. 368; Pittsburg & C. Railroad Co. *v.* Jundt, 3 Am. & Eng. R. R. Cas. 502; Strong *v.* S. & C. Railroad Co., 61 Cal. 326; Haas *v.* G. R. & C. Railroad Co., 47 Mich. 401 [11 N. W. 216]; Troy *v.* Railroad Co., supra."

And the second position suggested is sustained in the well-considered opinion of Justice Walker in Morrow *v.* Railroad, 147 N. C. 623, 61 S. E. 621, in which it was held: "(1) The failure of the employees of a railroad company to give crossing signals at a public crossing does not constitute negligence per se, when the injury complained of occurred to a pedestrian while using the track at a different place, but is only evidence of negligence under certain conditions." And delivering the opinion Judge Walker said: "But the fact that no such warning was given, while not negligence per se as to the pedestrian using the track for his own convenience, may be evidence of negligence as to him in the operation of the train when it is run in the nighttime without a headlight, and prudence requires a warning to be given. There was evidence in this case that the plaintiff when he was injured was where people in the vicinity were accustomed to walk, and under the circumstances he was entitled to notice of the approach of the train, if there was no headlight, and it was so dark that he could not see it in time to leave the track." And the general principle has been frequently upheld in other cases. Hinkle *v.* Railroad, 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Troy *v.* Railroad, 99 N. C. 298, 6 S. E. 77, 6 Am. St. Rep. 521.

Applying, then, the doctrine as it obtains with us, we are clearly of opinion that it was a negligent act to run an engine and tender backwards in the nighttime at a very high rate of speed, through a thickly settled community, where large numbers of people were habitually accustomed to use the track for a walkway, giving no signals or other warnings at public crossings, and with just a lantern in front of the tender as it was moving, throwing light along the track for a distance of only 10 to 15 feet. It was conduct that was more than likely to result in a collision, and, when it was shown as a result of such conduct that a person sitting on the track has been hurt in consequence, we think that actionable negligence against the company could very well be inferred.

It was suggested that the evidence showed that there was a sufficient light in front of the tender, because the plaintiff himself testified "that he saw the light a good ways off, and far enough to have saved Stewart," but it is no fair deduction from this excerpt that the witness intended to say that the light was adequate or at all sufficient to warn him that an engine was approaching, or that an injury was likely; on the contrary, and by correct inference, a purusal of the testimony of the witness justifies the interpretation that he saw the light some distance off, but that no signals or warnings having been given, and, very little noise having been made by the single engine and tender, the witness did not realize, and had no good reason to suppose, it was a train importing serious danger until it was very near, and, as soon as he did realize this, he called to his comrade and then jumped to save him. Here is the entire statement of the witness relevant to this suggestion: "Stewart sat down and said, 'Let's rest.' We had passed several crossings. Stewart sat down near a footpath on the right side, on the end of a cross-tie, with his head a little dropped. I was standing on the east side of the track, at the end of the cross-tie. I saw a light and heard the train. Stewart did not notice it, and I jumped and caught him, and the train knocked me loose. I thought it was a box car in front, or an engine and tender running backwards. The light showed to be like a lantern. It threw a light 10 or 15 feet in front. I could see the light a good ways off. It was dim. I saw the light far enough off to have saved Stewart and myself, but did not know it was a train, and heard no bell or whistle. The train made very little noise, and was running very fast." And on cross-examination: "When I saw the light and heard the train, I was standing near the end of the ties. I called to Stewart. He did not notice me, and I jumped across to pull him off." There is no claim on the part of the defendant that the usual signals were given on this occasion. Capt. Bullock, the engineer, testifying for defendant in reference to this question, said: "I tried to ring bell at all crossings and blow whistle, cannot say postively as to this one." And Capt. Howie, the conductor, said: "We were running fast, but I cannot say how many miles per hour, cannot say as to whether signals were given for crossings." And, under the authorities heretofore cited and others of like kind, we think that this failure to give the usual signals, with the absence of sufficient light to afford anything like adequate notice of the approach of the engine, in connection with the other facts heretofore stated, resulting in the killing of one man and the serious injury of another, made a case from which the jury were well warranted in rendering a verdict against defendant on the first issue.

This being true, it is well established that, when the life of a human being is suddenly subjected to imminent peril through an-

other's negligence, either a comrade or a bystander may attempt to save it, and his conduct is not subjected to the same exacting rules which obtain under ordinary conditions; nor should contributory negligence on the part of the imperiled person be allowed as a rule to affect the question. It is always required in order to establish responsibility on the part of defendant that the company should have been in fault, but, when this is established, the issue is then between the claimant and the company; and, when one sees his fellow man in such peril, he is not required to pause and calculate as to court decisions, nor recall the last statute as to the burden of proof, but he is allowed to follow the promptings of a generous nature and extend the help which occasion requires, and his efforts will not be imputed to him for wrong, according to some of the decisions, unless his conduct is rash to the degree of recklessness; and all of them say that full allowance must be made for the emergency presented. This principle is declared and sustained in many well-considered and authoritative decisions of the courts and in approved text-writers, and prevails without exception so far as we have examined. Eckert *v.* Railway, 43 N. Y. 502, 3 Am. Rep. 721; Corbin *v.* City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825; Md. Steele Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 42 L. R. A. 842, 71 Am. St. Rep. 441; Pa. Co. *v.* Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553; Mobile & Ohio R. R. *v.* Ridley, 114 Tenn. 727, 86 S. W. 606; Saylor *v.* Parsons et al., 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; Henry *v.* Railway (C. C.) 67 Fed. 426; Shearman & Redfield (5th Ed.) § 85. In Eckert's Case, *supra,* it was said: "The law has so high a regard for human life that it will not impute negligence in an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In Pa. Co. *v.* Langendorf, *supra,* it was held: "(1) It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. (2) While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger, and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment." In Railroad *v.* Ridley, *supra,* the same doctrine is thus

stated: "(2) It is not only lawful, but a laudable act, to attempt to save human life when it is imperiled by great danger, and in a sudden emergency and in such cases the courts will not require the intending rescuer to stop, and hesitate, and weigh probabilities until it is too late to make the rescue, but it is sufficient if he acts with such care as a reasonable prudent and careful person would use in such emergencies, and under similar environments. (3) Where a person acting in a sudden emergency and usuing such care as a reasonably prudent and careful person would use in such emergencies and under similar environments loses his life in attempting to save the life of another in imminent danger from the wrongful, careless, and negligent act or conduct of the defendant, he is not guilty of such contributory negligence as will bar a recovery for his wrongful death." In Shearman & Redfield, § 85, the author well says: "The plaintiff's right to recover is not affected by his having contributed to his injury, unless he is in fault in so doing. It is possible for the plaintiff not only to constitute to his own injury, but even to be himself its immediate cause, and yet to recover compensation therefor. Thus he has a right to assume some risk of personal injury when necessary to escape a greater risk. So one who, seeing his property imperiled, hastens to protect it, and in doing so imperils his own person, is not necessarily deprived of remedy thereby. It is his right and duty to protect his own property, so long as he can do so without recklessly exposing himself to injury. One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable as matter of law with contributory negligence; and, if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention. There need be no fear that this principle will make any one liable for the cost of volunteered benevolence without being himself in fault. No one is liable at all, unless he is in fault."

Applying this principle to the facts presented, there was certainly no error to defendant's prejudice in submitting the question of contributory negligence on part of plaintiff to the jury, and the learned judge correctly held that on the entire evidence. Defendant's motion for nonsuit should be denied. The authorities cited and relied on by the defendant are chiefly cases involving the proposition as to when and under what circumstances the employees of a railroad are required to stop its train in order to avoid a collision, and have no application here; for no such requirement was imposed on the company. In the present case responsibility on the first issue has been fixed on defendant, because of a breach of duty on the part of its agents and employees in running an engine backwards in the nighttime,

through a thickly settled community, at a high rate of speed, without any signals given at the usual places, and without adequate lights to warn one of its approach.

There is no error, and the judgment below is affirmed.

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* NEWMAN.

(Supreme Court of Arkansas, April 11, 1910.)

[127 S. W. Rep. 735.]

Animals—Running at Large—Liability of Owner.—The common-law doctrine that one who permits his cattle to stray upon another's land is liable as a trespasser is not recognized in Arkansas.

Animals—Injuring Animals at Large—Negligence.—Where a railroad company placed leaking oil cars in an open space on its right of way, where cows were accustomed to graze, and permitted the oil to fill the ditches so as to attract the animals to it, and its employees permitted the cattle to drink the oil for some days without attempting to protect them, though they saw some of the owners trying to drive them away, the company was negligent so as to make it liable for the death of a cow by drinking the oil, though it was not required to fence its right of way.

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by Charles F. Newman against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews, and *Jas. H. Stevenson,* for appellant.

S. Brundidge, Jr., and *H. Neely,* for appellee.

FRAUENTHAL, J. One of appellant's freight trains was wrecked at Bald Knob, and several tank cars, containing raw cotton seed oil, were damaged to such an extent that they leaked. These tank cars were hauled to Judsonia, Ark., and left there for several days, during which time the oil ran out of them in a steady flow. The cars were first placed near a road crossing and later a short distance therefrom, and the oil ran down into the ditches by the sides of the track and road, and stood in great pools in these ditches and in the road. The grounds on which the cars were placed were uninclosed, and cattle were accustomed to pass over them at will and there graze at times. A number of cattle drank of this oil, and from 20 to 25 head of

them died therefrom, amongst which was a cow owned by the appellee. The oil gave forth a great stench, and some of the owners who saw their cattle drinking it drove them away because they feared they would be injured by the oil. The appellant made no effort to guard the cattle from the oil or to drive them away. The plaintiff did not see his cow drinking the oil or know of it until some time afterwards. He sued the appellant and recovered judgment for the value of his cow, and this appeal is brought to reverse that judgment.

It is urged by counsel for appellant that under the evidence in this case it owed no duty to appellee, and therefore was guilty of no act of negligence for which appellee would be entitled to a cause of action, and that, if the appellant was guilty of any negligence, it was not the proximate cause of the injury, and, on this account, the appellee is not entitled to recover for the death of the cow. The liability of the appellant for the death of the cow depends upon the right of appellee to permit his cow to range at large and the effect that the act of appellant had in permitting the oil to run in the ditches at an uninclosed place near a public road, and in thus attracting the cow to drink the oil which caused its death. The common law made it the duty of the owner of domestic animals to keep them upon his own land, and if he failed in that duty and permitted them to stray upon the land of another, though uninclosed, he was chargeable with a trespass. But such a doctrine is not recognized in this state. The stock owner in this state is not accountable as a trespasser for permitting his stock to stray upon the open premises of another. L. R. & Ft. S. R. Co. *v.* Finley, 37 Ark. 562. The owner of domestic animals is therefore guilty of no violation of duty or of an act of negligence in permitting his cattle to run at large on such uninclosed lands of another. On the other hand, the owner of the land is not required to fence out the stock, and ordinarily owes no duty to one who thus suffers his stock to stray upon his land. He has the right to use his own property as he may see fit, but in that use he has no right to do a negligent act which will result in an injury to another. His liability arises in the use of his premises when he fails to observe for the protection of the property of another that degree of care and precaution which the circumstances demand, whereby an injury results to such other person's property. He does owe therefore to the owner of straying stock the duty to refrain from attracting or drawing to a dangerous object or substance which he has placed upon his land such stock. Such act becomes one of negligence whereby, if injury results to another, a liability is incurred. The landowner has no right to thus actively draw into peril straying stock. He may not be under any duty to guard the stock from the dangers to which they ordinarily might be ex-

posed, but if he places on his land a dangerous substance which would attract passing animals and thereby the animals are injured, if the injury is the natural and probable result of the act which a prudent man would have foreseen, then the landowner is liable for the injury resulting therefrom. K. C., S. & M. Ry. Co. *v.* Kirksey, 48 Ark. 366, 3 S. W. 190; Ingham on Law of Animals, p. 153; Railway *v.* Ferguson, 57 Ark. 17, 20 S. W. 545, 18 L. R. A. 110, 38 Am. St. Rep. 217.

Thus in the case of Crafton *v.* Hamilton & St. Joe R. Co., 55 Mo. 580, some salt was spilled at a depot while the employees were unloading it, and afterwards a cow was attracted to the place by the salt and killed by the cars, and it was held that it was an act of negligence to leave the salt on the track. Page *v.* N. C. Rd. Co., 71 N. C. 223. In the case of Henry *v.* Dennis, 93 Ind. 452, 47 Am. Rep. 378, the defendant placed and left exposed an open barrel of fish brine upon a public street, where the plaintiff's cow was lawfully running at large, and the cow ate and drank of the fish brine and was thereby poisoned. It was held that the defendant was guilty of an actionable wrong. See, also, Young *v.* Harvey, 16 Ind. 314. But we think that the doctrine announced in the case of Jones *v.* Nichols, 46 Ark. 207, 55 Am. Rep. 575, is decisive of this case. In that case the appellants were the owners of a cotton gin, and in an open space under the building a pit was dug for their cotton press. The appellee's cow fell into the pit, and was killed. In that case the court said: "The pit which the appellants dug and into which the cow fell in the nighttime was close to the highway. It was uninclosed, and was without signal of warning or protection. Moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that, in the language of one of the witnesses, it was not only a stock trap, but was actually baited for the game. The court instructed the jury, in effect, that, if they should find such a state of facts from the proof, the appellants were guilty of negligence which would render them liable for the injury done. This proposition cannot be controverted."

In the case at bar the appellant placed in an open space on its land its cars from which the oil leaked until it filled the ditches along the roadside. Here the domestic animals of the townpeople were accustomed to stray and graze, and they were attracted to the pools of oil and drank of it. This the employees of appellant saw and permitted for some days; and, although they saw that the owners of some of the animals seeing this drove them away because they feared the oil would kill them, the appellant's employees made no effort to guard the cattle from the danger or to drive away the animals of the other owners, but permitted them to drink the oil, amongst which was this cow of appellee's. The oil was a poison to the

cattle when drunk in the quantities as was done by them; and appellee's cow was killed by the oil which it thus drank. Under these circumstances, we think that the appellant was guilty of negligence which rendered it liable for the death of the cow.

The instructions given by the court were in accord with this view of the case, and we find no error in the rulings of the court upon any of the declarations of law given or refused.

The judgment is affirmed.

LINDLER *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, Feb. 14, 1910.)

[66 S. E. Rep. 995.]

Negligence—Violation of Ordinance.—Violation of an ordinance is negligence per se.

Railroads—Operation of Trains—Frightening Horses—Liability.—Where a railroad negligently permitted engines to stand on a crossing, and escaping steam frightened a horse driven over the crossing between the engines, injuring the driver, the question whether the engines were at such a place as to render the crossing dangerous by frightening horses, and the question whether the negligence and manner of their operation proximately caused the injury, were for the jury.

Railroads—Operation of Trains—Frightening Horses—Liability.*—A railroad negligently obstructing a crossing by allowing its train or

*For the authorities in this series on the subject of the liability of a railroad for injuries resulting from obstructing crossing with standing trains or cars, see note, 14 Am. & Eng. R. Cas., N. S., 832; State *v.* Baltimore & O. R. Co. (W. Va.), 33 R. R. R. 281, 56 Am. & Eng. R. Cas., N. S., 281 (railroad cannot be convicted of obstructing public road with freight train, when the evidence shows but a single offense, and that it was in violation of its rules and against its positive instructions to conductor in charge of train); Duffy *v.* Atlantic & N. C. R. Co. (N. Car.), 26 R. R. R. 102, 49 Am. & Eng. R. Cas., N. S., 102 (negligence in obstructing street with train); Gesas *v.* Oregon S. L. R. Co. (Utah), 28 R. R. R. 305, 51 Am. & Eng. R. Cas., N. S., 305 (negligence of railroad was question for jury in action for injury sustained in attempting to pass between cars obstructing crossings); Chicago, etc., R. Co. *v.* Roberts (Neb.), 6 R. R. R. 277, 29 Am. & Eng. R. Cas., N. S., 277 (act of company in leaving cars obstructing highway must be proximate cause of injury).

For the authorities in this series on the subject of the right of a highway traveler to climb over or go round a train or cars obstructing a crossing, see foot-note of Beck *v.* Southern Ry. Co. (N. Car.), 31 R. R. R. 791, 54 Am. & Eng. R. Cas., N. S., 791 (right to pass under or over a train obstructing a crossing); Atchison, etc., R. Co. *v.* Powers (Kan.), 8 Am. & Eng. R. Cas., N. S., 757 (passing around train).

cars to remain on the crossing unnecessarily or contrary to an ordinance is liable for injuries received by one attempting with due care to cross or go around the obstruction.

Railroads—Operation of Trains—Liability.†—Where trainmen, in violation of a statute, unnecessarily or wantonly blow the whistle of an engine or allow steam to escape, causing horses at a crossing to become frightened, the railroad is liable for the resulting injury.

Railroads—Frightening Animal—Willfulness—Evidence.—Evidence held to show that a railroad intentionally violated an ordinance in permitting its engines to stand on a crossing, authorizing punitive damages for injuries resulting from the frightening of plaintiff's horse.

Appeal from Common Pleas Circuit Court of Richland County; J. C. Klugh, Judge.

Action by Simon O. Lindler against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. M. Thomson, for appellant.
Nelson, Nelson & Gettys, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the wrongful acts of the defendant.

The following allegations are set out in the complaint: "That on or about the 11th day of February, 1905, plaintiff was driving his mare, drawing a single wagon, loaded, from the city of Columbia to his home, which was about five miles out on the 'Two Notch' road, and in so driving it was necessary for plaintiff to drive down Laurel street of the city of Columbia, and over and across the several tracks of defendant, which crossed said Laurel street on Laurens street. That the mare was gentle, and not afraid of street cars, automobiles, or engines. That when plaintiff drove up to near where he would have crossed the tracks there were two of defendant's engines, under steam, stopped and standing on one or more of defendant's tracks across said Laurel street, a public street of the city of Columbia, 100 feet wide, about 25 or 30 feet apart, blocking and obstructing said Laurel street, excepting 25 or 30 feet between said engines, and one of defendant's watchmen or flagmen was standing at said crossing. That said blocking and obstructing of said Laurel street by defendant, and allowing its said engines to stop and remain standing on said crossing, was in violation of the ordinances of the city of Columbia. That, in order for plaintiff

†See foot-note of Brunswick & B. R. Co. *v.* Hoodenpyle (Ga.), 28 R. R. R. 37, 51 Am. & Eng. R. Cas., N. S., 37; foot-note of Weller *v.* Lehigh Valley R. Co. (Pa.), 33 R. R. R. 313, 56 Am. & Eng. R. Cas., N. S., 313.

to proceed on his way, it was necessary for him to pass between said engines, which he proceeded to do, without being stopped or warned by said watchman or flagman of defendant. That while plaintiff was crossing said tracks the defendant carelessly, negligently, recklessly, willfully, and wantonly, and in utter disregard of the rights of the public and to this plaintiff, allowed its said engines to remain stopped and standing in said street, under steam, blocking and obstructing said street, caused its said engines to emit steam, and make various loud and frightful noises, whereby the mare became frightened, jumped, ran, and kicked plaintiff," etc. The defendant denied the allegations of the complaint and set up the defense of contributory negligence. The defendant did not offer any testimony, but at the close of the testimony in behalf of the plaintiff requested his honor, the presiding judge, to direct a verdict in its favor, on the following grounds: "There is no evidence offered tending to show any negligence or willfulness, as alleged in the complaint, that was the proximate cause of the accident. There is no evidence of willfulness. There is no evidence whatever showing any unusual or unnecessary noise made by the escape of steam or otherwise from those engines. Unless there had been testimony to that effect, there is absolutely no foundation for or cause of action on behalf of the plaintiff." The motion was refused, and the jury rendered a verdict in favor of the plaintiff for the sum of $1,212.50. The defendant appealed on the ground that the circuit judge erred in refusing the motion to direct a verdict, and upon the ground that the presiding judge refused to charge the following request: "There is no evidence tending to show that the proximate cause of the alleged accident was the obstruction of the crossing, if, indeed, the crossing was negligently obstructed; hence, if you believe from the evidence that there was no unusual or unnecessary noise made by the engine in question, then your verdict must be for the defendant."

The first question that will be considered is whether there was any testimony tending to show negligence on the part of the defendant which was the proximate cause of the injury. The ordinance provides that "it shall be unlawful for any railroad train, engine, car, or part of railroad train, to be stopped on any crossing in the city of Columbia, or to be permitted to remain stopped on any crossing of any street of the city, under a penalty of not less than ten dollars, nor more than forty dollars, for each and every offense. The violation of this ordinance was negligence per se. Dyson *v.* Railway, 83 S. C. 354, 65 S. E. 344. The proposition upon which the appellant's attorneys rely is thus stated in their argument: "It matters not whether there was a technical violation of the ordinance (set out at page 17 of the case), because we have the undis-

puted fact that there was ample space for plaintiff to pass between these engines and over the crossing. The mare did not take fright because the street was a little blocked, but on account of the escaping steam from the engines. It is a demonstrated fact that she took fright at the escaping steam, and nothing else. So that we have the single question whether there was any negligence or willfulness shown in allowing steam to escape from these engines. An engine cannot be operated without steam, and when it is at rest, as these engines were, the steam must necessarily escape, and, so long as there is nothing unusual or unnecessary about the escaping steam, no negligence can be inferred, and no liability would attach when a horse takes fright on account of the proper escape of steam." The question is not whether there was ample space for the plaintiff to pass between the engines, but whether they were at such a place, and in such close proximity, as to render it dangerous by causing horses to become frightened. The escape of steam is incidental to the operation of an engine, and its effect cannot properly be considered apart from its connection with the engine, when the defendant placed its engines on the crossing, in violation of the city ordinance. The question whether the engines and the manner of their operation was the proximate cause of the injury presented a question to be determined by the jury.

"The fact that a railroad company obstructs a street or highway at a public crossing, as by letting a train or cars remain thereon, for a reasonable or lawful length of time, and for proper purposes, is not negligence, and the company is not responsible for injuries caused thereby. But a railroad company is liable for injuries caused by reason of such obstruction when it amounts to negligence, as where it allows its trains or cars to remain on the crossing unnecessarily, or for an unreasonable or an unlawful length of time, by reason of which injuries are received by one who attempts with due care to cross or go around the obstruction." 33 Cyc. 931, 932. "The usual and proper sounding of whistles or other signals, or the proper escape of steam from its engines, is not negligence, and does not make the railroad company responsible for injuries caused by horses becoming frightened thereat. But where the employees unnecessarily, negligently, or wantonly blow the whistle, or allow the steam to escape, thereby causing horses to become frightened, the railroad is responsible for the resulting injury, where the acts are done in violation of statute." 33 Cyc. 937, 938. Under the circumstances herein, it cannot be successfully contended that the escape of the steam was not unusual or unnecessary.

The next question that will be considered is whether there was any testimony tending to show that the plaintiff was entitled to punitive damages. The following testimony tends to show, not

only that the defendant had notice of the ordinance, but time and again violated it intentionally. "Mr. Nelson: State whether the Southern knew they had no right to keep cars on the street, and why they knew it, and for what reason? A. I knew they tried to keep them open, and could not keep them open. Q. Who tried? A. Council. Q. How do you know? A. Policeman came there and told them to move, and, before they got away, they would come back again. He told me to keep them open. I could not keep them open. They could not keep them open, and I knew I could not. They would run them back on the track." The following testimony also tends to show that the engines were allowed to remain on the crossing such an unreasonable length of time as indicated a reckless disregard of the rights of the traveling public: "Q. Which engine had been standing there first, one on the north or the south side? A. On the north. Q. How long had the one on the north side been there? A. I don't know; been there an hour or so. Q. Anybody on it? A. Nobody on it. Q. Was any steam escaping? A. Steam was escaping out of both of them. Q. The one on the south side, how long had it been there? A. They stopped there at 1 o'clock to go to dinner. Q. What is the dinner hour out there? A. 1 or 2. Q. And it was stopped there at 1 o'clock? A. Yes, sir. Q. What time did Mr. Lindler get there? A. Nearly 2. Q. Those engines were standing there all the time? A. Yes, sir. Q. Anybody on it? A. Nobody on it."

Judgment affirmed.

TALLEY *v.* CHESTER TRACTION CO.

(Supreme Court of Pennsylvania, March 7, 1910.)

[76 Atl. Rep. 74.]

Railroads—Collision with Traveler—Question for Jury.*—Whether under the circumstances a driver should stop, look, and listen before crossing the tracks of a street railway is a question for the jury.

Railroads—Injuries to Traveler—Contributory Negligence—Question for Jury.—A question of the contributory negligence of a person injured by collision with a car where he looked and listened until the track was reached at which time his view was in a measure obstructed, and when he could place some reliance on his sense of hearing, in view of the duty of the motorman to give notice of the approach of a car to a public crossing, was for the jury.

Appeal from Court of Common Pleas, Delaware County.

Action by Amor Talley against the Chester Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

John B. Hannum, for appellant.
John M. Broomall, for appellee.

PER CURIAM. The accident happened in a rural district where the track of the defendant's road was laid on a narrow strip of ground that abutted on the highway on which the plaintiff was driving. Between the track and the highway there were at places trees and underbush that obstructed his view of the track. He testified that when he was 100 feet from an avenue that crossed the highway at right angles, into which he intended to turn on the side next the car track, he brought his horse to a walk and looked and listened for a car. From this point he could see back in the direction from which the car came 500 feet. He continued to look and listen as he drove on, but his view was cut off by trees and bushes at the roadside. As he turned from the highway into the avenue, he leaned forward and looked, but neither saw nor heard a car until his horse was crossing the first rail. He stopped his horse before it had crossed the second rail and tried to back off. The car was running very

*For the authorities in this series on the question whether a person must stop, look, and listen before attempting to cross street car tracks, see third foot-note of Hellieson *v.* Seattle Elect. Co. (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; fourth foot-note of Carroll *v.* Connecticut Co. (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; first foot-note of Cable *v.* Spokane, etc., R. Co. (Wash.), 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206.

rapidly on a downgrade, and no signal of its approach was given. The only question raised by the appeal is whether the case should have been withdrawn from the jury on the ground of the plaintiff's contributory negligence.

It is the duty of a driver, before crossing the track of a street railway, to look and to continue to look until the track is reached and to listen, if his view is obstructed. It may be his duty to stop, as under the facts in Omslaer *v.* Traction Co., 168 Pa. 519, 32 Atl. 50, 47 Am. St. Rep. 901, where an approaching car could not be seen because of obstructions nor heard because of other noises. Haas *v.* Railway Co., 202 Pa. 145, 51 Atl. 744; Smathers *v.* Railway Co., 226 Pa. 212, 75 Atl. 190. But there is no fixed duty to stop, and, unless the necessity for the additional precaution is obvious, the question whether under the circumstances it should have been taken is for the jury. The plaintiff did not act recklessly. He looked and listened until the track was reached. While his view was in a measure obstructed, he could place some reliance upon his sense of hearing, especially in view of the duty of the motorman to give notice of the approach of the car to a public crossing.

The judgment is affirmed.

WALLENBURG *v.* MISSOURI PAC. RY. CO.

(Supreme Court of Nebraska, April 23, 1910.)

[126 N. W. Rep. 289.]

Railroads—Accidents at Crossing—Duty to Look and Listen.*—It is the duty of a pedestrian upon a highway, in approaching a railway crossing, to look and listen for moving trains before attempting to cross the railway, but, if he does so, he is not necessarily negligent because he did not look at the most advantageous point and where, if he had taken heed, he probably would have seen an oncoming train, and avoided injury.

Trial—Abstract Instructions.—Instructions not applicable to the evidence should not be given, although they may state correct abstract principles of law.

Trial—Special Findings Inconsistent with Verdict.—Where special

*For the authorities in this series on the question whether there may be a recovery for injuries inflicted at crossing by a train which the highway traveler should have discovered before he made the attempt to cross the tracks, see Wilkinson *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; last paragraph of third foot-note of Lundergan *v.* New York Cent. & H. R. R. R. (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

findings of a jury can be reconciled with a general verdict and the relevant evidence in the record, the verdict will control.

Accident at Crossing.—Chicago, B. & Q. R. Co. *v.* Yost, 56 Neb. 439, 76 N. W. 901, and 61 Neb. 530, 85 N. W. 561, distinguished.

Barnes, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Douglas County; Troup, Judge.

Action by Minnie Wallenburg against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. W. Orr and *B. P. Waggener,* for appellant.
McCoy & Olmsted, for appellee.

ROOT, J. This is an action for personal injuries caused by the defendant's alleged negligence. The plaintiff prevailed, and the defendant appeals.

1. The defendant introduced no evidence, but insists that the testimony conclusively establishes plaintiff's contributory negligence. The plaintiff was injured by one of the defendant's locomotives at the intersection of its railway and Thirtieth street in a sparsely settled neighborhood in the outskirts of the city of Omaha. The street upon which the accident occurred is paved, runs north and south, and is frequently used by the public. The railway approaches the street on a curve from the southwest, and is about 18 inches above the surface of the street at said intersection. South of the track, and west of the street, earth has been taken from the defendant's right of way to construct an embankment so that the railway grade is elevated from 6 to 10 feet above the bottom of the borrow pits a short distance west of the street, and thence southwest several hundred feet. At the time the plaintiff was injured, August 14, 1905, there were weeds from 6 to 9 feet in height in the borrow pits, and smaller weeds upon the sides of the fill to within 4 feet of the railway, but this vegetation could in no manner obscure a pedestrian's view of a train approaching from the southwest. There are trees within the defendant's right of way west of the highway, so that 50 feet south of the railway an oncoming train may be seen a distance of only 200 feet southwest of the crossing; 36 feet south of the south rail a train is visible 400 feet distant, and 7 feet south of the track a train may be noticed 575 feet to the southwest. The railway grade is about 1 per cent., and declines towards the east and northeast. On the west side of the street a wooden sidewalk 82 feet in length extends to within 16 feet of defendant's main line, and the intervening footway is a cinder walk. At the time the plaintiff was injured she weighed 218 pounds, enjoyed good eyesight and hearing, and was in no manner distracted or confused. The train with which she col-

lided consisted of a locomotive and from 7 to 14 freight cars. It was coasting downgrade at an estimated speed of from 35 to 50 miles per hour, and no warning by way of sounding a whistle, ringing a bell, or otherwise was given of its approach.

The sixth instruction given by the court on its own motion reflects the testimony concerning plaintiff's conduct, and will advise the reader concerning the law of the case upon this phase of the suit: "You are instructed that the plaintiff has alleged in her petition, and has given evidence tending to show, that on the morning of the accident in question, and just prior to its occurrence, she was walking north on the sidewalk on the west side of Thirtieth street, proceeding in the direction of the railway in question; that at a point on said sidewalk from 35 to 37 feet south of the center of defendant's track on said crossing she looked and listened for approaching trains on defendant's road, but neither saw nor heard any. You are likewise instructed that the undisputed evidence, as well as the admissions of counsel for both parties in open court, establish conclusively the following facts: (a) That at the point last above stated where plaintiff claims she looked and listened for approaching trains, the same being from 35 to 37 feet south of the center of defendant's track, plaintiff had a clear, unobstructed view of defendant's track to the southwestward for a distance of 400 feet. (b) That the clear, unobstructed view of defendant's track in the direction named increased in proportion as the plaintiff proceeded northward, and that at a point 3 or 4 feet south of defendant's track, as it entered upon said crossing, there was a clear and unobstructed view of defendant's track to the southwestward 600 feet. (c) That plaintiff did not look again for approaching trains after the occasion above referred to (at a point from 35 to 37 feet south of defendant's track), but proceeded north, until she had stepped upon, or was about to step upon, defendant's track at said crossing, when she collided with, or was struck by, defendant's engine attached to a freight train coming from the southwestward, and was injured. And it is now for you to say, under these admitted facts and all the other evidence in the case and these instructions, whether or not plaintiff was guilty of contributory negligence as the same has been above defined to you. To aid you in determining this question, you are also at liberty to take into consideration the situation of the crossing, the general surroundings and conditions in the immediate vicinity of the same, and southwestward along and adjacent to defendant's track, as disclosed by the evidence, the manner in and the speed with which the trains of defendant were accustomed to being run or operated at and near that point, if such appears from the evidence, and all other attendant facts and circumstances bearing on the question, as shown by the evidence, including, in your consideration, the knowledge

or lack of knowledge of said plaintiff as to these matters. And in this connection you are further instructed that, on the one hand, plaintiff was bound to know that a railroad crossing is a dangerous place, and that she should approach it accordingly, having in view such dangers as a person of ordinary prudence would have reason to apprehend; and that, on the other hand, she was not required to anticipate, in view of the public character of the crossing in question, that an approaching train of the defendant would proceed at an unusual or dangerous rate of speed at that point, and that it would give such warning of its approach by sounding of whistle or ringing of bell as the law required. Having, then, in view all of the foregoing conditions and the evidence, probably a fair test to the solution of the point in question is: Estimating the distance at which the track seemed to be clear when plaintiff claimed to have observed the same as above stated, the time it would take a train to travel that distance, proceeding at a reasonable rate of speed, considering the nature of the locality, and the time it would require the plaintiff to cross the track in safety, proceeding northward from the point from which she observed defendant's track as above stated, would a person of ordinary care and prudence, under the same circumstances, have considered it safe to cross, without again looking for approaching trains? In other words, was her act in this respect, in view of all of the conditions, facts, and circumstances in the case, as shown by the evidence, such as ordinarily would have been taken by a prudent person? If it was, then it might fairly be said that the plaintiff was not guilty of contributory negligence; but if you should find, from a preponderance of the evidence, that it was not, and that such act directly contributed to the accident in question, then it might fairly be said that plaintiff was guilty of contributory negligence, and, in that event, she cannot recover in this action."

Cobbey's Ann. St. 1909, § 10,579 et seq., commands a railway company to give notice of the approach of its trains to public crossings by sounding a whistle or ringing a bell commencing at least 80 rods from the highway, and continuing the warning until the train shall have crossed the road or street. Failure to give this warning does not in itself establish the carrier's negligence, but may be evidence tending to prove that fact. The proof in this case justified a finding that defendant was negligent in failing to give the highway warning, and that such negligence was the proximate cause of plaintiff's injury.

The next inquiry concerns the plaintiff's negligence. Contributory negligence is but an inference to be deduced from primary facts. Individual minds frequently differ radically in drawing the conclusion of negligence from admitted or established facts, and the judgment of a layman not infrequently is

as sound as the logic of a judge upon the subject. The questions of negligence and contributory negligence are therefore as likely to be wisely solved by a jury as by a court, and ordinarily should be committed to the tribunal provided by law for ascertaining litigated facts. In the instant case the primary facts upon the issue of plaintiff's contributory negligence are undisputed, and the rule to be applied is well settled in Nebraska. If, from those facts, different minds may honestly conclude that plaintiff was guilty of negligence which proximately contributed to her injury, or that she was free therefrom, the jury, and not the court, should draw the inference and find the secondary fact. Atchison & N. R. Co. *v.* Bailey, 11 Neb. 332, 9 N. W. 50; American Waterworks Co. *v.* Dougherty, 37 Neb. 373, 55 N. W. 1051; Omaha St. R. Co. *v.* Loehneisen, 40 Neb. 37, 58 N. W. 535; Chicago, B. & Q. R. Co. *v.* Pollard, 53 Neb. 730, 74 N. W. 331; Schwanenfeldt *v.* Chicago, B. & Q. R. Co., 80 Neb. 790, 115 N. W. 285. The defendant argues that the plaintiff had a clear view of the railway track many feet west of the crossing; that if she had looked westward at any time before stepping upon the track she would have seen the train, and is guilty of contributory negligence because she did not look at a time when her sense of sight would have been an effective means to warn her of her peril. Decisions in point to sustain the proposition have been cited, but they do not appeal to us as sound. The rule seems harsh, and practically compels the individual to insure his own safety.

In Omaha, N. & B. H. R. Co. *v.* O'Donnell, 22 Neb. 475, 35 N. W. 235, we held that ordinarily the question of contributory negligence in cases like the one at bar, is for the jury. In that case, if the injured traveler had looked subsequent to his first and second observations and while yet in a place of safety, he could have seen the approaching train, but we held that his default did not, as a matter of law, convict him of contributory negligence.

In Omaha & R. V. R. Co. *v.* Talbot, 48 Neb. 627, 67 N. W. 599, we held that it is the duty of a traveler upon the public highway to look and listen while advancing towards a railway crossing, and if he fails to do so he will be guilty of negligence barring a recovery, even though the carrier was negligent in operating the train with which he collided. In that case the man in control of a team drove onto a railway crossing without looking or listening, and had not looked or listened while traveling 40 rods just before coming to said crossing.

In Chicago, B. & Q. R. Co. *v.* Yost, 56 Neb. 439, 76 N. W. 901, the plaintiff, a section hand, had been injured by a locomotive following a gravel train; he stepped off the railway and down an embankment; before returning to work and while at the foot of the grade he looked in the direction from whence

the passing train had come, but could not see the approaching engine because of an intervening wing fence; thereafter he did not look, although he had been warned by his superior to do so before stepping onto the track, and we held that he was guilty of contributory negligence as a matter of law. The case is reported on a second appeal in 61 Neb. 530, 85 N. W. 516, and a statement in the first paragraph of the syllabus, might if considered apart from the facts disclosed in the opinion, lead an indifferent observer astray. It must be remembered that Yost had violated a positive order of his employer made to secure the servant's safety. It is competent for a railway company to make a rule of that nature to govern the conduct of its employees, but it has no such control over the public. The power to compel a pedestrian to take so extreme a precaution under all circumstances is vested in the Legislature, and it has not spoken upon this subject. The court did not hold nor intend to hold in the Yost Case that all pedestrians without regard to surrounding circumstances must, just before stepping onto a railway, look for trains, or in default thereof be convicted of contributory negligence as a matter of law. The facts in the Yost Case clearly distinguish it from the case at bar and all other crossing cases reported in this jurisdiction. It does not rule the instant case, and should not be considered as authority in suits between a railway company and persons not in its employ.

At the time the first appeal in the Yost Case was determined, the opinion in Chicago, B. & Q. R. Co. *v.* Pollard, 53 Neb. 730, 74 N. W. 331, was on file, and no attempt was made to repudiate the principles of law announced in the Pollard Case. The facts in that case are that Pollard was driving along the highway and over a railway crossing; his attention was challenged by a pillar of smoke to the east which he thought indicated the presence of a train; turning from a consideration of the smoke just as his wagon was upon the crossing, he observed a train approaching from the opposite direction. It was held that the jury should say whether he was negligent or not. Mr. Chief Justice Harrison, speaking for the court, said: "It was not for the trial court, and is not for this court, to determine and say as a matter of law at just what exact point in the plaintiff's approach to the railroad he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose. The question was, did he, under his surroundings and all the circumstances, observe the care which ordinarily would have been taken by a prudent person?"

The plaintiff had crossed defendant's railway at Thirtieth street several times before the accident. She testifies that she was accustomed when traveling from the south to stop about 35 feet from the track and look southwest for trains; that at

times she had waited for trains to pass before attempting to cross and in her judgment an observation made at said point would advise her of an approaching train so that she could protect herself; that on the day she was injured, after looking east and west at her usual point of observation, she heard no sounds to indicate an oncoming train; thought it was safe to cross, and continued to listen for and to think about the train, but was giving attention to her walking; she was heavy, and it behooved her to notice the path she was a traveling. Mrs. Wallenburg insists that she did not hear or see the defendant's train until it collided with her. The evidence is uncontradicted that the defendant's train was being operated at a rapid and an unusual rate of speed, and that the highway warning was not given as it approached the crossing in question. Mrs. Wallenburg had traveled about half way between the southern line of the defendant's right of way and its track, at the time she last looked for a train, and it does not seem to us, as a matter of law, that she should be charged with the duty of anticipating that the defendant would negligently operate its train without warning the public by sounding the locomotive whistle or ringing the bell. The law does not arbitrarily and invariably fix the distance at which the plaintiff should have commenced to look and listen so long as she did so at a sufficient distance to enable her to discover the approach of a train and avoid injury by the exercise of reasonable and ordinary care, and whether she did exercise that care under the circumstances of this case is a question for the jury, and not for this court to determine. Schwanenfeldt *v.* Chicago, B. & Q. R. Co., 80 Neb. 790, 115 N. W. 285; Moore *v.* Chicago, St. P. & K. C. R. Co., 102 Iowa, 595, 71 N. W. 569; Nichols *v.* Chicago, B. & Q. R. Co., 44 Colo. 501, 98 Pac. 808; Boyd *v.* St. Louis, S. W. R. Co., 101 Tex. 411, 108 S. W. 813; Farrell *v.* Erie R. Co., 138 Fed. 28, 29, 70 C. C. A. 396; Oldenburg *v.* New York, C. & H. R. Co., 124 N. Y. 414, 419, 26 N. E. 1021; Greany *v.* Long Island R. Co., 101 N. Y. 419, 5 N. E. 425; Bonnell *v.* Delaware, L. & W. R. Co., 39 N. J. Law, 189. While we might not have found the facts as did the jury, the trial court properly submitted the issues to the triers of fact, and in our opinion there is sufficient evidence to uphold the verdict.

2. Instruction numbered 4, requested by defendant, was properly refused. The first proposition of law therein stated will apply to some cases, but not the instant one, and the closing paragraph is a command that the jury shall find for defendant. Instruction numbered 5, requested by defendant, does not correctly state the law. In so far as defendant complains because the jury were not told in so many words that a pedestrian in approaching a railway crossing should look each way for trains, it may be said that the court in the fifth paragraph of its charge said: "It was likewise the duty of the plaintiff before going upon

the track of defendant to look and listen for the approach of an engine or train, and to observe such reasonable precaution before attempting to cross the track as an ordinarily prudent man, under the same or like circumstances, would have observed." There is nothing in the record tending to prove that plaintiff looked to the east and not to the west, but the proof is that she looked in the direction of the approaching train, so that the failure of the court to use the word "each," or its equivalent, in its instructions did not prejudice defendant. Instruction numbered 8, requested by defendant, was properly refused; it is not applicable to the evidence. Instruction numbered 11, requested by defendant, may be correct as an abstract principle of law, but, in the light of the evidence adduced, was unnecessary. The evidence does not tend to support the last clear chance doctrine, and the court's instructions did not present any phase of that theory to the jury, hence it was proper to refuse the instruction last referred to. Instruction numbered 13, requested by defendant, purports to state the evidence in some particulars; it is not entirely accurate, is argumentative, and was properly refused. Instruction numbered 16, requested by defendant, states a rule of law in conflict with that announced in Chicago, B. & Q. R. Co. *v.* Pollard, *supra,* and invades the province of the jury. The special findings do not control the general verdict. The situation in this case upon the point considered is very much like the one created in Kafka *v.* Union Stock Yards Co., 78 Neb. 140, 110 N. W. 672.

3. The recovery is moderate, the nature and extent of plaintiff's injuries being considered. There is no suggestion in the brief that errors were committed in admitting or rejecting evidence, and the charge to the jury is fair and dispassionate.

The judgment of the district court, therefore, is affirmed.

THOMPSON *v.* SOUTHERN RY. CO. et al.

(Supreme Court of Georgia, April 18, 1910.)

[67 S. E. Rep. 939.]

Railroads—Accident at Crossing—Contributory Negligence—Effect.—Where a watchman is employed by one railroad company to watch all trains passing over a public crossing, and to give warning of their approach, and he temporarily engages in an act not shown to be essential to the discharge of his duty, and fails to watch for trains, and by reason thereof he is struck and injured by an engine of another railroad company lawfully using the track of his employer, the other company is not liable in damages for the injury, though its servants in charge of the engine may have been running the same at a greater speed than that allowed by a municipal ordinance.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Mattie Thompson against the Southern Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

A. H. Davis, for plaintiff in error.
McDaniel, Alston & Black, for defendants in error.

EVANS, P. J. Mrs. Mattie Thompson, the widow of James Thompson, sued the Southern Railway Company to recover damages for the alleged wrongful death of her husband. The court granted a nonsuit, and she brings error.

The evidence adduced by the plaintiff made substantially this case: Johns street, a public street in the city of Atlanta, was traversed by five railroad tracks; the two outer tracks on each side being the main lines, respectively, of the Western & Atlantic Railroad and the Southern Railway Companies. The middle track was the switching track of the Western & Atlantic Railroad Company, and was known as the "old exposition" track. The deceased was employed by the Western & Atlantic Railroad Company as a day watchman at the Johns street crossing. It was his duty to watch the crossing, and to look out for trains and pedestrians using the crossing. About dark on the 18th day of February, 1906, and a few minutes before he was to go off duty, a switch engine of the Southern Railway Company passed over the old exposition switch track. When the switch engine had passed Johns street, the watchman began to work around a fire with a shovel. He was accustomed to keep up a fire on cold, rainy days. He was busy with his fire, and not looking out for trains, when the switch engine of the defendant

company, which last passed, came back over the old exposition track, running at the rate of 10 or 15 miles an hour, striking him, and inflicting injuries from which he died. The day was cold and rainy, and the place where the watchman was hit was just beyond and within two feet of the edge of the crossing. The headlight on the switch engine had not been lighted, nor was there any bell rung on the engine, nor did the engineer check the speed of the engine while approaching the crossing. The ordinance of the city of Atlanta forbade, under a penalty, the running of trains within the city limits at a speed greater than 6 miles per hour.

The husband of the plaintiff was employed as a watchman by the Western & Atlantic Railroad Company. His employment as a watchman was a recognition, both by his employer and himself, that the place where he was to watch was one of danger, requiring a constant lookout for the approach of moving trains. Many trains daily crossed at that place, and it was his duty as watchman to maintain a strict watch as to the moving of trains at this point. The defendant railroad company was using the switching track of the Western & Atlantic Railroad Company; and, as the contrary does not appear, we cannot assume that such act was without its permission. The plaintiff's husband, at the time he was struck by the engine of the defendant company, running on the track of his employer, was inattentive and neglectful of his duty to watch the track of his employer for approaching trains. His whole attention was given to a fire near the track and the street, and while thus engrossed he was struck by an engine which had but a few minutes before passed over the crossing. The testimony does not disclose who built the fire, or whether the plaintiff's husband was mending or extinguishing it. It was a cold day, and most probably he had built it for his own comfort. Be that as it may, there is nothing in the record to show that his engagement with the fire was of such an engrossing and imperative nature as to excuse his neglect of duty in watching out for trains. He was stationed there to look out for trains, and by turning aside from this duty he voluntarily placed himself in a position of peril, and his own negligence proximately contributed to his fatal injury. It is true that the railroad company may have been negligent in violating the speed ordinance of the city of Atlanta, and in failing to observe the requirement of the public crossing law (Civ. Code, § 2224); yet these acts of negligence related to the running of the trains which the plaintiff's husband was employed to watch. If he had performed his duty as watchman, he could have observed the approach of the engine, even though it was running faster than the rate of speed limited by the municipal ordinance, and though the engineer failed to check

the engine as required by Civ. Code, § 2224. It was his own negligence which contributed to his fatal injury, and was the proximate cause thereof. Central R. Co. *v.* Smith, 78 Ga. 694, 3 S. E. 397.

Judgment affirmed. All the Justices concur.

MCCORMICK *v.* OTTUMWA RY. & LIGHT CO.

(Supreme Court of Iowa, Feb. 17, 1910.)

[124 N. W. Rep. 889.]

Street Railroads—Injuries to Travelers—Negligence—Question for Jury.—In an action for injuries to plaintiff, by a street car striking his buggy from the rear, evidence held to require submission of the motorman's negligence to the jury.

Street Railroads—Injuries to Travelers—Contributory Negligence—Care Required.*—While the care required of one about to cross a street railway track along which he is traveling is practically the same as where he is about to cross a steam railway cossing, it is generally held that the rule of "stop, look, and listen" does not apply with the same force.

Street Railroads—Injuries to Travelers—Contributory Negligence.—Plaintiff, a farmer, whose eyesight and hearing were both defective, started to drive his team across a street railroad track in the middle of a block, when he was struck and injured by a car approaching from the rear. He had traveled on such street from 900 to 1,000 feet without looking or listening for a car approaching from the rear, and his only excuse for not doing so was that he thought there was but one car on the line, and he saw this approaching from the opposite direction. It was not unusual, however, for defendant to operate two cars on the line, especially on Sundays and circus days, as was the day of the accident, and at the time plaintiff was struck the car which he saw approaching was about to take a switch directly in front of plaintiff, in order that the other car might pass. Held, that plaintiff was negligent as a matter of law.

Street Railroads—Injuries to Travelers—Contributory Negligence—Last Clear Chance.†—Plaintiff's negligence having extended up to the very time of the accident, and it appearing that the motorman, on discovering plaintiff's peril, used every appliance possible, and stopped

*See foot-note of second preceding case.

†For the authorities in this series on the subject of the "last clear chance doctrine," see second foot-note of Powers *v.* Des Moines City Ry. Co. (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first foot-note of Bourrett *v.* Chicago, etc., Ry. Co. (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; fourth foot-note of Norfolk, etc., Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

the car as soon as possible, plaintiff could not recover under the last clear chance rule, on the theory that the motorman's negligence in failing to discover plaintiff's peril before he did was the proximate cause of the accident, since on this theory the negligence of both parties would be concurrent, precluding the application of the rule.

Appeal from District Court, Wapello County; M. A. Roberts, Judge.

Action at law to recover damages for injuries received by plaintiff in a collision with a street car owned and operated by defendant upon a street in the city of Ottumwa. At the conclusion of the testimony the trial court directed a jury which had been impaneled for the trial of the case to return a verdict for defendant, which was accordingly done, and plaintiff appeals. Affirmed.

Steck, Dougherty & Steck, for appellant.
McNett & McNett, for appellee.

DEEMER, C. J. While driving along what is known as North Court street in the city of Ottumwa in a single-seated buggy, with a single horse, the said buggy was struck by one of defendant's motor cars approaching plaintiff from the rear, throwing him to the ground, and producing the injuries of which he complains. As the exact negligence claimed is a material inquiry in the case, we quote the following from the petition: "Plaintiff avers that said injuries were caused entirely by and through the fault and negligence of defendant company, its authorized agents, and employees, in that at said time defendant's car was running at a high and dangerous and unlawful rate of speed, to wit, at the rate of 12 to 15 miles per hour, in violation of the ordinance of the said city of Ottumwa; that plaintiff, as well as the obstruction to plaintiff's continued passage on that side of the defendant's track on the said public street, was for blocks, in plain view of the motorman operating the said car, as also the fact that the top of plaintiff's buggy obscured the view of plaintiff to defendant's car coming on him from the rear, notwithstanding which the defendant's employees continued to run the car at the rate of speed aforesaid without seeing plaintiff, who was in plain view, and without having the car under control so as to avert the injury, as defendant was bound and required so to do and have, and failing to ring the gong or give to plaintiff any warning or notice whatever of the coming of said car, and, thus running and operating the said car, did carelessly and negligently without knowledge of plaintiff run on and against plaintiff and his buggy, wherefore and whereby plaintiff was injured as herein claimed."

Plaintiff's version of the affair as given on the witness stand is substantially as follows: He is a farmer living some dis-

tance north of the city of Ottumwa. He came into the city on the morning of July 28, 1906, there being a circus in the town that day, and about 6:30 in the evening he started for his home. After getting his horse and vehicle he came onto what is known as North Court street, at its intersection with Washington. Reaching Court he turned and drove north on the east side thereof, passing its intersections with what is known as Marion, Lincoln avenue, and Ottumwa street, respectively, and was approaching the junction with Maple avenue when he was struck by defendant's car coming from the south. He testified that when he first came into Court street he looked both ways for a car and saw none in either direction. He claims that as he approached Maple avenue he saw a car coming from the north and approaching him, and that he also noticed a wagon standing in front of a store on the southeast corner of Court street and Maple avenue, and, believing that there was not room for him to pass between this wagon and the coming car, he pulled across the street car track toward the west, and was struck by a car coming from the south. It appears that regularly there was but one car which ran along this street, and that the one which struck plaintiff's buggy was an extra put on to accommodate the circus-day crowd. There was also testimony from which a jury may have found that the north-bound car gave no alarm and sounded no gong or whistle, although the testimony on this proposition is in sharp conflict. There is also a conflict in the testimony as to the speed at which the car was being run. Taking that version most favorable to plaintiff, we must assume that it was going somewhat faster than six miles per hour just before it struck the plaintiff's rig. Giving to the testimony, as we must, its most favorable aspect for plaintiff, we are constrained to hold that there was enough evidence of defendant's negligence as charged to take the case to the jury.

2. It also appears from the testimony that plaintiff's eyesight and hearing are both defective, that he did not, after coming into Court street, look to the rear and south again until he was struck by the car, and that he traveled north from 900 to 1,000 feet after getting onto Court street. Had he looked back at or near the point where he was struck he could have seen a car for a distance of at least 900 feet. He was not struck at a street crossing but at a point between Ottumwa street and Maple avenue, and had he continued driving north on the east side of the street railway track he would have been in no danger from either car. The car going south was approaching a side track, which it took, or was to take, to allow the north-bound one to pass, and was running slowly toward the south when the collision occurred. The distance from Washington street, where plaintiff turned onto Court, to the intersection of Court with Maple avenue was approximately 1,000 feet. Plaintiff was perfectly

familiar with the street, having traveled the same as he said 40 times a year, and had frequently passed street cars thereon. He knew of the switch, and according to the testimony must have driven north on Court street, and on the east side thereof, for nearly 900 feet before he drove upon the street car tracks, and was struck by the car. It is conceded that from the time he reached Court street until he was struck by the car he did not look back to see if a car was coming, nor did he listen or take any of the usual precautions before going upon the track. He saw the south-bound car approaching the siding, which to our minds is a material circumstance, and, without looking to the rear, suddenly drove upon the street car track and was struck by the north-bound car. We here quote from plaintiff's testimony the following: "Q. You say when you crossed Washington street you looked? A. I looked both ways. Q. And from that time until the accident happened did not look back? A. No, sir. Q. Did you look back at any time? A. No, not back. Q. Now, I want you to answer this question, did you, after you got onto Court street from Washington street, while you were going north, try or attempt to look back to ascertain whether there was any car coming from the south until a very few seconds before the accident? Answer that by 'Yes' or 'No.' A. No."

As heretofore stated there was, according to some of the testimony a wagon standing in front of a grocery store at the southeast corner of Court street and Maple avenue, and plaintiff claims that to pass around this wagon he pulled toward the street car track, intending to cross over and let the south-bound car pass him. He must have attempted to cross the track something like 100 feet south of the wagon, which he claims was so situated as to prevent his passing between the wagon and a street car should it come along while he was attempting to pass the wagon. The excuse offered by plaintiff for his failure to look back or listen before going upon the track is that he thought there was but one car upon the line, and because he saw the one approaching the switch, coming from the north, he inferred that this was the only car upon the line, and that there could not be another coming from the south. The testimony shows, however, that it was not unusual to run two cars on this line. The exact testimony upon this point is that whenever large crowds of people were moving, such as Sundays and circus days, two cars were run upon this line. The presence of the switch which the south-bound car was approaching was notice to plaintiff that there was or might be use for it, and as no other use could be suggested under the record than for the passing of cars, this fact is a most material circumstance to be considered in disposing of the case.

Plaintiff's account as to how the accident occurred we state as

it appears in the record: "About 100 feet from where this wagon was I started to cross the track, as I could not go between the wagon and the car track. I started in an angling way for about 30 feet. * * * The street was paved. I was driving along about 6 feet from the track until I got within 30 feet of where I was struck, and started angling across the track. * * * I was about 6 feet from the rail before I commenced drawing in the 30 feet from the place of the accident. * * * After I crossed the track at Washington street I looked both ways; there was a turnout beyond Maple avenue. That's where the team was standing. Car going north passed the car going south there. After I got to Court street I observed a car coming south on Court street, after I got to the top of the hill. I was about halfway from top of the hill to the place of the accident when I saw the car. Traveled slow trot on Court street. * * * I saw a car coming south just north of the switch a little piece. The car had not stopped that I knew of it. The car was not stopped on the switch that I saw. The car was right on me before I saw it. It struck the left hind wheel of my buggy. * * * Did not look back for car after going on Court street. The buggy top was too high, and I was looking ahead at that car when I saw it. Q. Well, you say when you got onto the car track, at any rate the car was on you? A. Yes, sir. Q. I believe you said not over 15 or 20 feet from— How many feet was the car from you when you got onto the track? A. Well, I do not know. Q. Well, you have said to the jury that it seemed to be right on you, how many feet would you say it was away from you, 10 or 15 feet away? A. It looked to me like it was only 2 or 3 feet."

This testimony convinces us that plaintiff was, as a matter of law, guilty of contributory negligence. His eyesight was bad, and his hearing defective. He did not, before attempting to cross the track, take any of the usual precautions for his own safety; he neither looked nor listened, and his only excuse for not doing so is, that, as there was a car approaching the switch from the north, he thought there could be no other from the south. The presence of the switch was, however, notice to him that another car might be approaching from the south, and surely called for some vigilance on his part. Now while the "degree of care" required of one who is about to cross a street railway track along which he is traveling is practically the same as where one is about to cross a steam railway crossing, yet it is quite generally held that, on account of the methods of operating and the measure of control which the street railway has over its cars and trains being so different from that which obtains in the management of steam railways, what would constitute ordinary and reasonable care in the one case would not in the other; that is to say, the strict rule as to stopping, look-

ing, and listening does not apply with the same force where one is about to cross a street railway track as where one is approaching, and is about to cross, a steam railway track. See Orr v. R. R. Co., 94 Iowa, 426, 62 N. W. 851; Perjue v. Light & Gas Co., 131 Iowa, 710, 109 N. W. 280; Beem v. R. R. Co., 104 Iowa, 565, 73 N. W. 1045; Barry v. R. R. Co., 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; Doherty v. R. R. Co., 137 Iowa, 364, 114 N. W. 183; Doran v. R. R. Co., 117 Iowa, 447, 90 N. W. 815. Yet it has never been held that one may heedlessly and without giving attention to his surroundings drive upon a street railway track. He is bound to the use of ordinary and reasonable care on his part. It has frequently been held, and the authorities are practically unanimous on the proposition, that if the driver of a buggy or wagon drives upon a street railway track at a place other than a street crossing without looking for approaching cars or taking any other precautions for his own safety, he is guilty of contributory negligence as a matter of law, and cannot recover, even though the car be driven at an excessive rate of speed, unless the facts shown bring the case within the doctrine of what is known as the "last clear chance." Highland Co. v. Sampson, 91 Ala. 560, 8 South. 778, s. c. 112 Ala. 425, 20 South. 566; Citizens' R. R. v. Helvie, 22 Ind. App. 515, 53 N. E. 191; Hurley v. West End. Co., 180 Mass. 370, 62 N. E. 263; Wood v. City Ry. Co., 52 Mich. 402, 18 N. W. 124, 50 Am. Rep. 259; Wosika v. City Ry. Co., 80 Minn. 364, 83 N. W. 386; Carson v. Ry. Co., 147 Pa. 219, 23 Atl. 369, 15 L. R. A. 257, 30 Am. St. Rep. 727; Beerman v. Ry. Co., 24 R. I. 275, 52 Atl. 1090; Burns v. St. Ry. Co., 66 Kan. 188, 71 Pac. 244; Lockwood v. Ry. Co., 92 Wis. 97, 65 N. W. 866. And it is also the general rule that if the driver's view be obstructed on account of the construction of his vehicle, or by reason of its load, the case is still stronger against him. Omslaer v. Traction Co., 168 Pa. 519, 32 Atl. 50, 47 Am. St. Rep. 901; Kelly v. St. Ry. Co., 175 Mass. 331, 56 N. E. 285; Solatinow v. St. Ry. Co., 70 N. J. Law, 154, 56 Atl. 235; Helber v. St. Ry., 22 Wash. 319, 61 Pac. 40; Boerth v. Ry. Co., 87 Wis. 288, 58 N. W. 376. These rules are generally held to apply, although, perhaps, not with the same degree of strictness, to cars coming from the rear. Adolph v. R. R., 76 N. Y. 530; Kupferschmid v. Ry. Co., 70 Mo. App. 438; Cawley v. Ry. Co., 106 Wis. 239, 82 N. W. 197; U. P. Co. v. St. Ry. Co., 4 Neb. (Unof.) 396, 94 N. W. 533.

Now it will be noticed from the foregoing recitation of facts that plaintiff drove upon and across the track where he was struck without looking back to ascertain whether or not there was a car coming from the south, without listening and without taking any precautions whatever to know if there was a car coming from that direction. His excuse, which has heretofore been stated, is not sufficient to relieve him from his failure to

exercise some care to protect himself from injury from an approaching car. He had driven along the street parallel with the street car track for from 900 to 1,000 feet without looking back or listening to see or to know whether or not a car was coming from that direction. The fact that the car coming from the north was evidently going upon the switch was sufficient to suggest that there might be another car coming from the south. In view of this record we are united in the conclusion that plaintiff by his own negligence contributed to the injury of which he complains. The following cases from other states are clearly in point upon this proposition: Davidson *v.* Tramway Co., 4 Colo. App. 283, 35 Pac. 920; McClellan *v.* Electric Ry. Co., 110 Wis. 326, 85 N. W. 1018; McGauley *v.* Transit Co., 179 Mo. 583, 79 S. W. 461; Stafford *v.* Ry. Co., 110 Wis. 331, 85 N. W. 1036; Fritz *v.* St. Ry. Co., 105 Mich. 50, 62 N. W. 1007; Blakeslee *v.* Consolidated St. Ry. Co., 105 Mich. 462, 63 N. W. 401. Our conclusions also find support in Ames *v.* Transit Co., 120 Iowa, 640, 95 N. W. 161; Beem *v.* Electric Co., 104 Iowa, 563, 73 N. W. 1045. So much upon the question of contributory negligence.

3. Counsel insist that the case involves the doctrine of what is now generally known as "the last clear chance," and that, notwithstanding plaintiff's negligence, he is entitled to recover, for the reason that such negligence was not the proximate cause of the injury, and is no defense to an action based upon the negligence of the motorneer of the car after he knew, or might have known, of plaintiff's negligence. This rule is easily stated, but in its application many difficult and troublesome questions arise. The general statement of the doctrine is as follows: "The party who has the last opportunity of avoiding an accident is not excused by the negligence of any one else. His negligence and not that of the one first in fault is the proximate cause of the injury." Again it has been stated in this way: "Where both parties are negligent, the one that has the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it; his negligence being deemed the direct and proximate cause of it." The rule is bottomed sometimes upon one proposition, and sometimes upon another, and sometimes upon both. The first is that in such cases defendant's negligence, instead of being concurrent, is the sole and proximate cause of the injury, and the other is that plaintiff's negligence is no defense to wanton or willful negligence. When bottomed solely upon the last proposition, to wit, wantonness or willfulness, it is apparent that something more than the want of ordinary care is necessary. The injury must either be willful or, as said in some cases, be due to such gross negligence as that wantonness or willfulness may be inferred. When bottomed upon the former proposition—that is

to say, upon the doctrine that defendant's negligence, being last in point of time, is the proximate, and plaintiff's precedent negligence the remote, cause—neither wantonness nor willfulness nor their equivalent need be shown. But it must appear in such cases that plaintiff's and defendant's negligence are not concurrent in point of time. If concurrent in this sense then there can be no recovery, save where the rule of comparative negligence obtains.

We have adopted the last fair chance doctrine for this state, and have planted it upon the proposition, as originally announced, that he who has the last opportunity of avoiding an accident is not excused by the negligence of any one else; his negligence being deemed the approximate cause of the injury. In the application of this rule we have held that if plaintiff's negligence concurs in point of time with that of the defendant, then, in the absence of proof of wantonness or willfulness, plaintiff cannot recover. For example, if a motorneer sees one upon a railway track and in a position of peril, and does nothing to stop his car so as to avoid injury, which he might have done had he exercised the care required of him, it is no defense to an action against him, by the injured party, that he (the party injured) was guilty of negligence in going upon the track. On the other hand, if one goes upon a track ahead of a moving car, and continues to travel thereon without taking any precaution for his own safety, and his negligence continues down to the very time he is struck by a moving car, he cannot recover, unless he shows that the employee in charge of the car saw him and knew, or, as some of the cases put it, should have seen him and knew or should have known that he was in a place of peril. Ordinarily, however, if the employee does not see one who has negligently gone upon the track in front of his car, his negligence in not keeping a lookout, unless it be in exceptional cases, being nothing more than the want of ordinary care concurring with that of the injured plaintiff, it does not render the master liable. We are not to be understood at this time as holding that failure to see, which is due to the negligence of an employee, is the equivalent of knowledge on his part, for that question is not before us. It is certainly true, however, that as bearing upon the question of whether or not he did see, his duty to be on the lookout for persons who may rightfully be upon the track is evidence of the fact that he did in fact see the party injured. As applied to the facts of this case, this is all that need be definitely announced at this time. These statements are justified, we think, from our previous cases, and, perhaps, suggest the solution of some apparently conflicting statements in the opinions heretofore announced by this court. See, as sustaining these views, Doherty *v.* Railway Co., 137 Iowa, 363, 114 N. W. 183; Orr *v.* Ry. Co., 94 Iowa, 423, 62 N. W. 851; Morris *v.*

Railway, 45 Iowa, 29; Deeds *v.* Ry. Co., 69 Iowa, 164, 28 N. W. 488; Romick *v.* Ry. Co., 62 Iowa, 167, 17 N. W. 458; Spencer *v.* Ry. Co., 29 Iowa, 55; Keefe *v.* Ry. Co., 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542; O'Keefe *v.* Ry. Co., 32 Iowa, 468; Sutzin *v.* Ry. Co., 95 Iowa, 304, at pages 308 and 312, 63 N. W. 709; Goodrich *v.* Ry. Co., 103 Iowa, 418, 72 N. W. 653; Kelsey *v.* Ry. Co., 106 Iowa, 253, 76 N. W. 670; Kelley *v.* R. Co., 118 Iowa, 392, 92 N. W. 45; Barry *v.* St. Ry. Co., 119 Iowa, 64, 93 N. W. 68, 95 N. W. 229; Gregory *v.* Ry. Co., 126 Iowa, 238, 101 N. W. 761; Hughes *v.* Ry. Co., 128 Iowa, 214, 103 N. W. 339; Clemans *v.* Ry. Co., 128 Iowa, 396, 104 N. W. 431; Earl *v.* Ry. Co., 109 Iowa, 18, 79 N. W. 381, 77 Am. St. Rep. 516; Campbell *v.* Ry. Co., 124 Iowa, 309, 100 N. W. 30. We shall not take the time nor space necessary to review these cases. It is enough to deduce what we believe to be the doctrines announced therein.

Going now to the record for the facts, we find that plaintiff was driving along a street on a trot between two intersecting streets on the east of the street railway track, and at a safe distance therefrom; that as he approached a car coming from the north, he suddenly, and without previous notice, pulled his horse out upon the railway track, either obliquely or almost at right angles, and while in this position was struck by a car coming from the rear. The fender of the car struck the left rear wheel of the buggy as it angled across the track, but there is no evidence that either the buggy or the fender was damaged, and the testimony shows that the car did not go more than five or six feet after the fender struck the buggy. Plaintiff testified, as already stated, that the car was right onto him when he got upon the track, not more than two or three feet. Other witnesses placed the distance at from 10 to 20 feet, some, as we read the record, more than 30. According to plaintiff, he started to cross the track in an angling way; others said he pulled on the left line, and turned right onto the track, and still others that he turned square, or almost square, across the track. The motorneer testified that he saw plaintiff, and that he unexpectedly drove upon the track in front of his car, and that as soon as he saw plaintiff was going upon the track, he used every appliance and stopped his car as soon as he could. There is no testimony that the car could have been stopped any sooner, and no sufficient showing of any negligence after the motorneer saw plaintiff's peril. As the car approached the plaintiff, he was in a perfectly safe place at the side of the street, and he did not get into a position of peril until he attempted to cross the track in front of the moving car. The motorneer had no reason to apprehend that plaintiff would suddenly drive upon the track in front of the moving car. Plaintiff was not obliged

to cross the track in order to pass the wagon, which was a hundred or more feet from him. If he supposed, as is now indicated, that he would have to do so to let the car from the north pass him, he was choosing the most dangerous course. He might, if he thought the car was going on south, have waited a moment or two for it to pass, instead of turning out upon the track and in front of it. If, on the other hand, he thought it had stopped, or was about to stop at the siding, which was not at a place for passengers to alight, he should have apprehended that there was some reason for this, and have cast his eyes to the rear before going into a place of danger. The pivotal points here are that the motorneer had no reason to apprehend that plaintiff would leave that part of the street upon which he was then traveling—a place of safety—and without notice drive across the track and in a position of danger. According to the uncontradicted testimony, as soon as the motorneer discovered plaintiff's peril, he used every effort to stop his car, and did so in such a way as to avoid breakage either to the car or buggy. It is not a case for the application of the rule that the motorneer should have seen the plaintiff before he did, and that his means of knowledge is the equivalent of actual knowledge, for plaintiff's negligence continued down to the very moment of the collision. It was as much plaintiff's duty to be on the outlook for cars upon the railway track as it was of the motorneer to be watchful of teams which might go upon the track. In other words, in this aspect of the case the negligence of the parties was concurrent and co-operating. This conclusion is sustained by the following, among other cases: Omslaer *v.* Traction Co., 168 Pa. 519, 32 Atl. 50, 47 Am. St. Rep. 901; Stafford *v.* Chippewa Valley Co., 110 Wis. 331, 85 N. W. 1036; Christensen *v.* Trunk Line, 6 Wash. 75, 32 Pac. 1018; Hanley *v.* Ft. Dodge, 133 Iowa, 333, 107 N. W. 593, 110 N. W. 579; Davidson *v.* Tramway Co., 4 Colo. App. 283, 35 Pac. 920.

Regard must be had of the fact that the accident did not occur at a street crossing, but at a point where defendant had the superior right of way, and where the motorneer had the right to assume that plaintiff would not place himself in a position of danger. None of the cases cited and relied upon by appellant run counter to the views herein expressed. We need not review them, as an examination will show their inapplicability. We refer more particularly to Perjue *v.* Gas Co., 131 Iowa, 710, 109 N. W. 280; Barry *v.* Electric Co., 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; Christy *v.* Ry. Co., 126 Iowa, 428, 102 N. W. 194; Powers *v.* Ry. Co., 115 N. W. 494; Remillard *v.* Traction Co., 138 Iowa, 565, 115 N. W. 900; Stanley *v.* Ry. Co., 119 Iowa, 526, 93 N. W. 489—each and all of which are clearly distinguishable. We might have refused to consider the case

on technical grounds, but have concluded to decide it on its merits.

Appellee's motion to strike appellant's abstract, brief, and argument is overruled.

The judgment of the trial court seems to be correct, and it is affirmed.

DENVER CITY TRAMWAY CO. *v.* WRIGHT.

(Supreme Court of Colorado, June 7, 1909. Rehearing Denied March 7, 1910.)

[107 Pac. Rep. 1074.]

Judgment—Trial of Issues—Judgment Notwithstanding Verdict.—A motion for judgment non obstante veredicto cannot be interposed by a defendant in a law case.

Negligence—Question for Jury.—What constitutes negligence and reasonable care is a question for the court, but whether the facts relied on to show either have been proved is for the jury.

Trial—Direction of Verdict—Nonsuit.—On motions by defendant for directed verdict and for nonsuit, all disputed facts are to be decided in favor of the plaintiff, and all presumptions and inferences favorable to him which the evidence warrants must be accepted as true.

Negligence—Questions for Jury.—When the facts or the inferences to be drawn therefrom are in any substantial degree doubtful or fair-minded men might reach different conclusions from the facts, the question of contributory negligence must be submitted to the jury.

Street Railroads—Injuries to Bicyclist—Evidence—Question for Jury.—Evidence in an action against a street railroad for causing the death of a bicyclist held sufficient to take the questions of negligence and contributory negligence to the jury.

Negligence—Contributory Negligence—Last Clear Chance.*—A plaintiff may recover for personal injuries notwithstanding his own negligence exposed him to injury, if defendant after becoming aware of his peril, or after he could have become cognizant of it by the exercise of proper watchfulness and precaution, failed in that respect, and such failure was the proximate cause of the injury.

Municipal Corporations—Streets—Right as to Use.—Streets in a city are public thoroughfares, on which all have the right to travel, but neither a wheelman, a pedestrian, a street car, a carriage, nor even an automobile has an exclusive right to their use. The rights and duties are relative, and all must use reasonable care not to injure each other.

*See last foot-note of preceding case.

Denver City Tramway Co. *v.* Wright

Street Railroads—Operation—Right of Way Over Tracks.†—By reason of its character as a means of conveyance, a street car has a preferential right over the space occupied by its tracks, but such right must be exercised with due regard to the rights of others.

Street Railroads—Operation—Care Required of Pedestrians—Question for Jury.—It is not negligence per se for a pedestrian or a traveler by the usual or ordinary means of locomotion to propel himself across or along a public street, even though in so doing he crosses over or passes along between street railway tracks, his negligence depending upon all the facts and circumstances existing and attending the act, but, in such case, a greater degree of watchfulness and caution is required than where streets are not so burdened.

Street Railroads—Operation—Care Required of Car and of Pedestrian.‡—A pedestrian or traveler on a street occupied by a street railroad is bound to exercise ordinary care and such reasonable prudence and precaution as the attendant circumstances may require to avoid injury, and a like duty rests upon the street car company.

Street Railroads—Operation—Negligence—Speed of Car.—Where, in an action against a street railroad company for causing the death of a bicyclist, it appeared that decedent was run into from behind by a car, that the motorman had full knowledge that hundreds of wheelmen daily rode along the space between double tracks, that they generally "laid over" to the other side to permit approaching cars to pass, and it further appeared that a car was approaching decedent at a distance of 200 or 300 feet away, that decedent had given no intimation that he was aware of such approach, and was "laying over" to let such approaching car pass—it was negligence for the motorman to fail to slacken the speed of the car, or, if needs be, to stop the car until he knew that decedent was aware of his danger and would have ample time to protect himself therefrom, and the sounding of the gong or the ringing of a bell was not sufficient under the circumstances.

Street Railroads—Operation—Care Required.§—While perhaps a

†For the authorities in this series on the subject of the right of way as between a street car and another vehicle or person, see first foot-note of Carroll *v.* Connecticut Co. (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; second head-note of Hellieson *v.* Seattle Elect. Co. (Wash.), 34 R. R. R. 337, 59 Am. & Eng. R. Cas., N. S., 337; last paragraph of second foot-note of Henry *v.* Seattle Elect. Co. (Wash.), 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721.

‡For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see last paragraph of second foot-note of Hellieson *v.* Seattle Elect. Co. (Wash.), 34 R. R. R. 337, 57 Am. & Eng. R. Cas., N. S., 337; last foot-note of Powers *v.* Des Moines City Ry. Co. (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first head-note of Carroll *v.* Connecticut Co. (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780; second foot-note of Keefe *v.* Seattle Elect. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725.

§For the authorities in this series of the subject of the right of those

motorman may rightfully assume that a pedestrian will turn out of the way of the car, he cannot rest on such presumption so long as to reach a point where it will be impossible for him to control his car or give warning in time to avert injury.

Appeal and Error—Record—Abstract—Review.—Appellant, in order to avail himself of objections to refusal of the court to give instructions requested, must set out in the printed abstract, not only such requested instructions, but also those given.

Trial—Instructions—Construction as a Whole.—An instruction in an action against a street railroad for causing the death of a bicyclist on the track precluded plaintiff recovering if the jury found that deceased turned suddenly in front of the car from a position where the car would safely have passed him, and that, after he did so, the motorman could not have avoided the accident by the use of ordinary care. The court further instructed, after declaring as a matter of law that a person who rides between the tracks of a street railway is guilty of contributory negligence, that the motorman was under no obligation to slacken the speed of his car from the mere fact that such bicyclist was riding between the double tracks at a safe distance from the car, but had the right to assume that such wheelman would remain at such safe distance and allow the car to pass, and if deceased was so riding, but turned in front of the car at so short a distance that the motorman in the exercise of ordinary care could not have stopped in time to avoid the accident, the verdict should be for defendant. Held, that an instruction, telling the jury that deceased had no legal right to ride his wheel between the tracks, and that it was contributory negligence to so do, and the jury should find for defendant unless they further found that the motorman by the exercise of ordinary care could have seen deceased and known he was in a position of peril, and failed to exercise such care and caution in stopping said car as a person of ordinary care and prudence would have exercised under like circumstances, taken in connection with those given, was not erroneous.

Appeal and Error—Review—Harmless Error—Error Favorable to Appellant.—Error in an instruction assuming that it is negligence per se for a person to ride a bicycle between the tracks of a street railroad, being favorable to the street railroad, cannot be complained of by it on appeal.

Street Railroads—Injury to Bicyclist on Track—Action—Pleading.—In such action, plaintiff need not plead a municipal ordinance relating to the sounding of a gong, etc., in order to avail himself thereof on the trial.

in charge of trains or street cars to act on the assumption that persons seen on or near track will get out of danger in time, see last foot-note of Miller's Adm'r *v.* Illinois Cent. R. Co. (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396; second head-note of Wilkinson *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; last foot-note of Norfolk, etc., Co. *v.* Forrest's Adm'r (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

Denver City Tramway Co. *v.* Wright

Street Railroads—Operation—Injury to Bicyclist on Track—Pleading.—Where, in such action, it appeared that the accident occurred after the car had passed over a street crossing, pleading failure to sound a gong after passing over said crossing was equivalent to pleading a municipal ordinance requiring the motorman to ring the gong when he has reason to believe there is danger of a collision.

Appeal and Error—Review—Harmless Error—Evidence.—Though the reception in evidence in such action of an ordinance which appeared to refer to another street railroad company, its successor and assigns, limiting speed of street cars to 12 miles an hour, was error because no evidence was introduced connecting defendant with such company, the error was harmless where a motorman of defendant on cross-examination, without objection, testified that the schedule rate of speed on the street where the accident occurred was 12 miles an hour, and that hundreds of bicyclists passed over the street at the point of accident each day, and where there was other evidence showing the street to be much traveled.

Street Railroads—Operation—Speed of Car.‖—Where it appeared that the street at the point of the accident was passed over daily by hundreds of bicyclists, and that the schedule rate of speed at that point was 12 miles an hour, it was as a matter of law the duty of the company not to exceed that speed.

Street Railroads—Operation—Injuries to Bicyclist on Track—Ordinance.—An ordinance of the city of Denver fixed the rate of speed of street cars on that "portion of its said lines between Cherry creek and 19th street in the said city of Denver" at not to exceed 8½ miles per hour, and "outside of the above bounded territory" at a speed not exceeding 12 miles per hour. In an action against a street railroad company for causing the death of a bicyclist on the track, it appeared that the accident occurred either within the territory between Cherry creek and Nineteenth street or outside of said territory. Held, that the objection of the street railroad that the ordinance did not apply to the place of the accident was untenable.

Appeal from District Court, City and County of Denver; P. L. Palmer, Judge.

Action by Elizabeth J. Wright against the Denver City Tramway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles J. Hughes, Jr., Gerald Hughes, and *Albert Smith,* for appellant.

Talbot, Denison & Wadley, for appellee.

‖For the authorities in this series on the subject of the duty of those in charge of street cars to regulate speed in order to avoid collisions with other users of streets, see last foot-note of Birmingham, etc., Co. *v.* McLain (Ala.), 33 R. R. R. 463, 56 Am. & Eng. R. Cas., N. S., 463; second head-note of Carroll *v.* Connecticut Co. (Conn.), 34 R. R. R. 780, 57 Am. & Eng. R. Cas., N. S., 780.

WHITE, J. Appellee, as plaintiff below, instituted this action against appellant, as defendant below, to recover damages alleged to have been sustained by reason of the death of her husband, William G. H. Wright, through the negligence of the defendant.

The complaint as it stood after a motion to strike certain portions thereof had been ruled upon, in substance, charged that defendant, a Colorado corporation, operated a street railroad on Broadway in the city of Denver, whereon there were double tracks—one on the east and the other on the west side of said street, with a space of about eight feet between the two—and was using cars thereon propelled by means of electricity; that said Wright was riding his bicycle and came upon Broadway from the west on West Sixth avenue, turned north towards East Seventh avenue, and traveled along a certain pathway or portion of said street customarily, and with full knowledge of defendant, used by wheelmen for such purpose; that said bicycle path lay about two feet west of and parallel to the east track of defendant; that while the said Wright was then and there in the exercise of due and proper care and without negligence on his part a train of defendant's electric cars traveling behind him, and in the same direction on said east track, was carelessly and negligently operated by defendant's servants; that it was propelled on said street in a northerly direction "at a greater rate of speed than 12 miles an hour, to wit, at the rate of 25 miles an hour;" that the servants of defendant in charge of said train by keeping a vigilant watch could have seen said Wright, and that he was in danger of being run against and injured by said train, and could have averted said injuries by slowing up or stopping said train, but wantonly, negligently, and recklessly failed to so do; that the said deceased did not know of the proximity of said train to him and was unaware of its approach; that the failure of defendant to ring or sound its bell or gong at said Sixth avenue street crossing or after it passed over the same was in violation of a duty imposed by city ordinance; that by reason of the negligence of the defendant the said train of cars overtook, ran down, and killed the said Wright; that by an ordinance of the city of Denver the speed limit for cars on said street was not to exceed 12 miles per hour; and that in exceeding such speed defendant company was acting in violation of said ordinance. The answer admitted the corporate existence of defendant and the operation of its railroad on Broadway and over the tracks situate as above, denied all other allegations in the complaint, and alleged contributory negligence on the part of deceased. The new matter in the answer was denied by the replication.

At the close of plaintiff's evidence, defendant moved for a directed verdict in its favor on the grounds that plaintiff had

failed to show any negligence on the part of the defendant which could be held to be the approximate cause of the accident; that the evidence showed plaintiff guilty of contributory negligence in riding between the tracks; and that deceased was never up to the time of the accident in a dangerous position. This motion was overruled, and likewise one for nonsuit based upon the same grounds. After all the evidence was in, the motion for directed verdict was renewed, but denied. Objections were made by the defendant to the giving and the refusal to give certain instructions, and to the introduction in evidence of the speed limit ordinance. A verdict was returned in favor of the plaintiff. Thereupon motion for new trial was filed, but subsequently withdrawn, and a motion interposed by defendant for judgment non obstante veredicto. This was denied and judgment given upon the verdict, from which this appeal is prosecuted.

A motion for judgment non obstante veredicto cannot be interposed by a defendant in a law case. It was therefore not error to overrule it. Quimby *v.* Boyd, 8 Colo. 194, 6 Pac. 462; Hall *v.* Linn, 8 Colo. 264, 5 Pac. 641; Floyd *v.* C. F. & I. Co., 10 Colo. App. 54, 56, 57, 50 Pac. 864. The motions for directed verdict and for nonsuit were also properly denied. What constitutes negligence and reasonable care is a question for the court, but whether the facts relied upon to show either have been proved is for the jury. In the determination of such matters all disputed facts are to be decided in favor of the plaintiff, and all presumptions and inferences favorable to him, which the evidence warrants, must be accepted as true. Nichols *v.* Chicago, B. & Q. R. Co., 44 Colo. 501, 98 Pac. 809. Therefore, when the facts or the inferences to be drawn therefrom are in any substantial degree doubtful, or fairminded men might reach different conclusions from the facts, the only proper rule is to submit the question to the jury for determination. It is only where the facts are undisputed, and but one inference can be drawn from them, that it becomes the duty of the court to determine as a matter of law whether there was such lack of negligence or the presence of such contributory negligence as to preclude a recovery. Behrens *v.* K. P. Ry. Co., 5 Colo. 400; Denver S. P. & R. R. Co. *v.* Wilson, 12 Colo. 20, 27, 20 Pac. 340; Lord *v.* Pueblo S. & R. Co., 12 Colo. 390, 21 Pac. 148; Guldager *v.* Rockwell, 14 Colo. 459, 24 Pac. 556; Horn *v.* Reitler, 15 Colo. 316, 25 Pac. 501; Union C. & C. Co. *v.* Sundberg, 36 Colo. 8, 85 Pac. 319. We are clearly of the opinion that there was ample evidence in this case to warrant its submission to a jury under proper instructions. The evidence in behalf of plaintiff, considered in its most favorable light, proved her case, or, at least, sufficiently established it to support a verdict in her favor. Moffatt *v.* Tenney, 17 Colo. 189, 30 Pac. 348.

From the testimony of witness Lott, it appears that he was riding beside deceased from Sixth avenue, where he had overtaken him, saw a car on west tracks coming south towards them. Witness was riding near the south-bound track, deceased near the northbound track between the double tracks. Witness, who had come from further south on Broadway, knew that car was coming from the south, but did not think that deceased did, dropped behind deceased so that car going south could pass. Wright was riding from six to eighteen inches west of the inside rail of the north-bound track. Witness did not hear any bell sounded or any warning from the car at that time, though had heard whistle or gong further back. After striking Wright, the car ran half a block—200 feet—before it stopped.

Witness Collins testified, in substance, was riding on bicycle about 200 feet behind Wright; saw him for a distance of 240 feet. He rode from a foot to a foot and a half from the left rail of the north-bound track; was watching him; did not deflect himself nor make turn in front of the car.

Witness Dillon testified, in substance, saw Wright come on to Broadway from Sixth avenue. The car that killed him was 25 or 30 yards in his rear. This car was coming behind him, and there was another car going south on the other track. Deceased "layed over" to the north-bound track for the car that was coming meeting him on the south-bound track to pass, and came down the track until the car hit him. Nothing between Wright and the car to obstruct the motorman's view. The car was going 18 or 20 miles an hour. The car went from 120 to 125 feet after it struck the man.

Witness Swingle testified, in substance, had crossed Cherry Creek bridge going south; saw deceased and two other men riding bicycles north between double tracks; a car was coming on the east tracks going north; another car on the west line was going south. The other two bicyclists turned out of the way of the car. Wright rode some distance after they turned out and seemed to be "laying over" for the car that was coming from town going south. This car was about 200 or 300 feet back north. Car going north was traveling not less than 18 miles an hour. Nothing to obstruct the motorman's view; could have seen Mr. Wright if he had been looking. Wright rode between the four tracks and was overtaken by the car that was going north, struck, and run over. Car traveled after it struck him before it stopped at least 125 feet. Other evidence gave speed of car at from 15 to 20 miles an hour.

The defendant's testimony was to the effect that deceased appeared to be out of the reach of the car, but, just as the car got opposite to him, he turned abruptly in front of it, and was picked up with the fender; that he was about 4 or 5 feet in front of the car when the turn was made; that car was gonged and

blew whistle as it came to Sixth avenue, and just before Wright was struck whistle blew again; that speed of the car was between 10 and 12 miles an hour; that after deceased turned in on track car could not help hitting him, even if speed had been 5 or 6 miles an hour; car coming in opposite direction; was no obstruction between the two; nothing to have prevented Wright from turning to left or even crossing west track entirely; customary for wheelmen to ride between double tracks; hundreds of them every day; their general custom on the approach of a car is to "lay over" to the other side.

Under the evidence we are of the opinion that the jury might properly have found that the deceased was not guilty of such contributory negligence as to preclude a recovery herein. The jury could under the facts of this case believe that his negligence was not the proximate cause of his death. Whatever the law may be elsewhere—and it is unnecessary to review the many cases cited from other states—in this jurisdiction it is well established that a plaintiff may recover for personal injuries notwithstanding his own negligence exposed him to injury, if the defendant, after becoming aware of his peril, or after he could have become cognizant of it, by the exercise of proper watchfulness and precaution, failed in that respect, and such failure was the proximate cause of the injury. Denver & B. P. R. T. Co. *v.* Dwyer, 20 Colo. 132, 137, 138, 36 Pac. 1106; Hector Min. Co. *v.* Robertson, 22 Colo. 491, 494, 45 Pac. 406; Posten *v.* Denver Tram. Co., 11 Colo. App. 187, 192, 53 Pac. 391. In Nichols *v.* Chicago, B. & Q. R. Co., supra, the law applicable here is announced as follows: "In K. P. Ry. Co. *v.* Cranmer, 4 Colo. 524, it was held that the plaintiff in a case for personal injuries may recover notwithstanding his own negligence exposed him to injury, if the defendant, after becoming aware of his peril, failed to use ordinary care to avoid injuring him, and such failure was the proximate cause of the injury. In D. & R. G. Ry. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582, this court advanced a step, and held, in effect, that this rule was not limited in its application to cases where the peril of the person injured was actually discovered by those at whose hands the injury was sustained but extended to cases where such peril could have been discovered by the exercise of reasonable care upon their part. The principle underlying these propositions is that the party who has the last opportunity of avoiding injury must prevent it if, by the exercise of reasonable care, he can do so, and, if he does not, it is his negligence in this respect, and not that of the one first in fault, which is the proximate cause of the injury." In Philbin *v.* D. C. Tram. Co., 36 Colo. 331, 336, 85 Pac. 630, 632, it is said: "If a motorman saw, or by the exercise of ordinary care and diligence should have seen, a person or vehicle ahead of his car, and through the careless

or negligent failure to apply such means as the exigencies of the case require to stop the car a collision occurs, the company will be liable for the damages occasioned thereby"—citing in support of the proposition the following: Davidson *v.* Tramway Co., 4 Colo. App. 283, 35 Pac. 920; Beach on Con. Neg. 288a; Booth, Street Railway Law, §§ 305, 306, 315, 316, 317; Lawler *v.* Hartford Ry. Co., 72 Conn. 74, 43 Atl. 545; Adolph *v.* Central Park Ry. Co., 76 N. Y. 530; Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908; 27 Am. & Eng. Enc. of Law, 68, 70, 74, 75, 77. And in the same case, after citing D. & R. G. Ry. Co. *v.* Buffehr, 30 Colo. 27, 69 Pac. 582, as announcing the rule "that, if the defendant fails to see what he was bound to look for and ought to have seen, he is guilty of negligence," says: "We believe this rule applies with peculiar force to those in charge of street railway cars propelled by electricity along the streets of a city." Such streets are public thoroughfares on which all have the right to travel, but neither a wheelman, a pedestrian, a street car, a carriage, nor even an automobile has an exclusive right to their use. Their rights and duties are relative, and all must use reasonable care not to injure each other. By reason of its character as means of conveyance, the street car has a preferential right over the space occupied by its tracks, but such right must be exercised with due regard to the rights of others. Denver City Tram. Co. *v.* Martin, 44 Colo. 324, 98 Pac. 836; Philbin *v.* D. C. Tram. Co., supra; Davidson *v.* Tramway Co., supra; Cooke *v.* Baltimore Trac. Co., 80 Md. 551, 554, 31 Atl. 327.. It is not negligence per se for a pedestrian or a traveler by the usual or ordinary means of locomotion to propel himself across or along a public street, even though in so doing he crosses over or passes along between street railway tracks. The question of negligence depends upon all the facts and circumstances existing and attending the act. Certainly in such case a greater degree of watchfulness and caution is required than where streets are not so burdened. The pedestrian or traveler is bound to exercise ordinary care and such reasonable prudence and precaution as the attendant circumstances may require to avoid injury, and a like duty rests upon the street car company. Denver City Tram. Co. *v.* Martin, supra. In Philbin *v.* D. C. Tram. Co., supra, it is further said: "It is the duty of the motorman to exercise ordinary care and diligence to ascertain whether the track ahead is clear and to avoid striking persons or objects upon the track, when by the exercise of ordinary care and diligence it is reasonably possible to do so, and he is bound to notice the presence of other vehicles and pedestrians ahead of his car, and should be watchful for that purpose, and, if he has reason to apprehend danger, he should regulate the speed of his car, so that it might be quickly stopped should occasion require it."

With full knowledge that hundreds of wheelmen daily ride along the space between the double tracks, that they generally "lay over" to the other side to permit approaching cars to pass, that a car was coming from the north approaching Wright at a distance of 200 or 300 feet away, that Wright had given no intimation that he was aware of the approach of the car behind him, and, as the evidence shows, was "laying over" to the north-bound track to let the south-bound car pass, would impress any fair-minded person that such wheelman was in imminent danger, and was unaware of it. A duty therefore rested upon defendant to regulate the speed of its car, so that it might have been quickly stopped when occasion required it. The sounding of the gong or the ringing of the bell, if such occurred, and as to that the evidence was conflicting, was not sufficient under the circumstances of this case. Under these circumstances, it was clearly negligence in the defendant in failing to slacken its speed, or, if needs be, stopping its car, until it knew that deceased was aware of his danger and would have ample time to protect himself therefrom. It may be true, as announced by some courts, that a motorman has the right to assume that a wheelman, upon the sounding of a gong, would timely leave his position of danger, but certainly such presumption will not maintain where there is present in the mind of the motorman, or should be, the facts given above. The presumption that naturally arises under these circumstances, and which should have arisen in the motorman's mind, is that the wheelman was unconscious of the approach of the north-bound car. Upon this question of the duty of the defendant, it is proper to say that, while perhaps a motorman may rightfully assume that a pedestrian will turn out of the way of the car, he cannot rest on such presumption so long as to reach a point where it will be impossible for him to control his car, or give warning in time to avert injury. Randle *v.* Birmingham Ry. Light & Power Co., 158 Ala. 532, 48 South. 114; Currie *v.* Consolidated Ry. Co., 81 Conn. 383, 71 Atl. 356; Baldie *v.* Tacoma Ry. & Power Co., 52 Wash. 75, 100 Pac. 162, 163.

The objections to the refusal to give instructions requested can be of no avail to defendant. It has not embraced within the abstract the court's entire charge to the jury. Of the 18 separate instructions constituting the charge, but 7 are embodied in the printed abstract. Appellant must not only set forth in that document the instructions refused, but also those given in order that this court may know how the jury were advised. The instructions given may embody those refused. Otto *v.* Hill, 11 Colo. App. 431, 432, 53 Pac. 614; Birmingham *v.* People, 40 Colo. 362, 365, 90 Pac. 1121. Nor can defendant predicate error upon instruction No. 2 given, and of which complaint is made.

That instruction, in effect, told the jury that deceased had no legal right to ride his wheel between the tracks of the defendant company, and that it was contributory negligence to so do, and the jury should find for the defendant, unless they further found that the motorman in charge of the car, by the exercise of ordinary care, could have seen the deceased and known he was in a position of peril and failed to exercise such care and caution in stopping said car to avoid injury to deceased as a person of ordinary care and prudence would have exercised under like circumstances. This instruction, taken in connection with instructions Nos. 17 and 18 of the court's charge requested by the defendant, is certainly as favorable to the defendant, if not more so, than the record discloses it was entitled to have. Instruction No. 17 precluded the plaintiff recovering if the jury found that deceased turned suddenly in front of the car from a position where the car would safely have passed him, and that, after he did so, the motorman could not have avoided the accident by the use of ordinary care. While instruction No. 18, after declaring as a matter of law that a person who rides between the tracks of a street railway was guilty of contributory negligence, told the jury that a motorman was under no obligation to slacken the speed of his car from the mere fact that such bicyclist was riding between the double tracks at a safe distance from the train, but had the right to assume that such wheelman would remain at such safe distance and allow the train to pass, and if deceased was so riding, but turned in front of the car at so short a distance that the motorman in the exercise of ordinary and reasonable care could not have stopped his car in time to avoid the accident, their verdict should be for the defendant. The only vice in these instructions is the assumption that it is negligence per se for a person to ride between the tracks of a street railway, but of that defendant cannot complain. It is also probably true that deceased was negligent under the conditions then existing—not that he was upon or near the company's tracks, but because he was not properly watchful and cautious.

The ordinance referred to in the pleadings and introduced in evidence as to defendant's duty to sound gong or ring bell is in two divisions: First, when approaching a street crossing; second, when the motoneer has reason to believe there is danger of a collision. An instruction—No. 3—based upon the second subdivision of this ordinance, is complained of. It is contended that the allegations in the complaint are as to the first subdivision, to wit, failure to ring within 60 feet of the crossing, and that it does not plead a violation of the second subdivision requiring the motoneer to ring when he has reason to believe there is danger of a collision. Whether or not the complaint properly pleads a violation of the second subdivision is of no importance.

The ordinance is evidence—as to what is negligence—and it was no more necessary to plead it than to plead any other evidence upon which plaintiff relied for recovery. Denver City Tramway Company *v.* Martin, 44 Colo. 324, 98 Pac. 836, 838. However, the failure to sound a gong after passing over said crossing was pleaded. The accident occurred after that event. Therefore the ordinance was sufficiently pleaded.

It must be conceded that receiving in evidence the speed limit ordinance and giving the instruction based thereon, over the objections made by defendant, was error. The ordinance appeared to refer to the Denver Tramway Company, its successors and assigns. No evidence was introduced connecting the defendant with that company. We are of the opinion, however, that this judgment should not be reversed because of this technical error. A motorman of defendant on cross-examination without objection testified that the schedule rate of speed on Broadway where the accident occurred was 12 miles per hour; also, as heretofore seen, that hundreds of bicyclists passed over the street at that point each day, and other evidence showed it to be a much traveled street. Under these undisputed facts, it was as a matter of law the duty of the company not to exceed that speed, and the court could have properly so declared and based an instruction thereon, irrespective of the ordinance. The further objection is made that the ordinance did not apply to the place of the accident. The language of the ordinance fixed the rate of speed on that "portion of its said lines between Cheery Creek and Nineteenth street in the said city of Denver" at not to exceed 8½ miles per hour, and "outside of the above bounded territory" at a speed not exceeding 12 miles per hour. The accident occurred either within the territory between Cherry Creek and Nineteenth street, or outside of said territory. Therefore, upon that point certainly the defendant cannot complain.

We are clearly of the opinion that no substantial rights of the defendant have been disregarded and the error committed was not prejudicial. The judgment will therefore be affirmed.

Affirmed.

STEELE, C. J., and BAILEY, J., concur.

FALLON *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk, Feb. 26, 1903.)

[87 N. E. Rep. 480.]

Street Railroads—Injuries to Travelers—Negligence.—Where a street railway motorman, if he had been observing, would have discovered that plaintiff was driving across the tracks when he was a considerable distance away and where there was plenty of time for him to cross, if the speed of the car had not been increased or was slightly checked, but the motorman nevertheless increased the speed of the car until he put the brake on just before the collision, he was negligent.

Street Railroads—Injuries to Travelers—Contributory Negligence.* —Where plaintiff, when he started to drive across the track in front of a street car, saw the car some distance away, and thought there was sufficient time to cross, and had no reason to expect that the speed of the car would be increased, as it was, resulting in a collision before he could get across, he was not negligent as a matter of law.

Report from Superior Court, Suffolk County.

Action by Ambrose S. Fallon against the Boston Elevated Railway Company. A verdict for plaintiff was set aside, and a verdict directed for defendant, and the case was reported to the Supreme Judicial Court under an agreement of counsel. Judgment for plaintiff.

John F. McDonald and *Jas. M. Graham,* for plaintiff.
Endicott P. Saltsonstall and *S. H. E. Freund,* for defendant.

KNOWLTON, C. J. The wagon in which the plaintiff was riding was struck by an electric car on Washington street, between Roslindale and Forest Hills, in Roxbury, and the plaintiff was thrown out and injured. The street, for a distance of more than a quarter of a mile in each direction from the place of the accident, was perfectly straight and nearly level. The accident happened at a little before midnight, on a bright, clear night, with electric lights near the place, and there were no other vehicles in the vicinity except another electric car which had passed by a short time before. The street at that point is 41 feet wide between the curbstones, leaving a space about 13½ feet wide on each side between each outer rail of the double track of the street railway and the adjacent curbstone. The plaintiff was driving on the right-hand side of the outward track from Bos-

*See note at end of case.

ton, and the car was coming towards Boston on the inward track. Franklin Place leads off from Washington street at an acute angle, and then plaintiff turned to the left to cross the tracks diagonally, intending to enter Franklin Place; but before the hind wheels of his wagon had passed the outer rail of the second track, the forward righthand corner of the car collided with the rear part of his wagon. He testified that he saw the car coming when it was a long distance away, and that he thought he had sufficient time to cross until it was close upon him, when he shouted to the motorman, and turned his horse sharply to the left to escape a collision. A witness who was riding with the motorman on the front platform of the car testified that he saw the plaintiff's horse and wagon when the car was about 500 feet away, and another witness, riding in the same place, said he saw them when the car was 300 or 400 feet away, and both of them testified that the motorman did not seem to notice the plaintiff until he was very near him. They said that the car was running very fast, and that its speed was increasing until the motorman put on the brake just before the collision occurred.

There was ample evidence to warrant a finding that the motorman was negligent. If he had been observing the track before him he would have seen that the plaintiff was crossing the tracks when he was a considerable distance away, and when there was plenty of time for him to cross if the speed of the car was not increased or was slightly checked. The testimony is that the plaintiff was driving slowly.

Whether there was evidence that the plaintiff was in the exercise of due care is a question more difficult to answer. He testifies that he thought there was sufficient time to cross. He had reason to suppose that the motorman would see him when he was a long distance away, and he certainly had no reason to expect that the speed of the car would be increased. Driving naturally, he would enter upon the track a long time before the car would reach the place of crossing, and he well might expect that the motorman would check the speed of the car if necessary, rather than to run against him. While the jury well might have found that he was negligent, we are of opinion that his conduct presented a question of fact proper for their consideration, on which they might decide that he was in the exercise of ordinary care. The case is fairly within the decision in Driscoll *v.* West End Street Railway Company, 159 Mass. 146, 147, 34 N. E. 171. Other cases which tend strongly to support the plaintiff's contention are Le Blanc *v.* Lowell, Lawrence & Haverhill Street Railway Company, 170 Mass. 564, 49 N. E. 927; Laliti *v.* Fitchburg & Leomister Street Railway Company, 172 Mass. 147, 51 N. E. 524; Scannell *v.* Boston Elevated Railway Company, 176 Mass. 170, 57 N. E. 341; Wood *v.* Boston Elevated Railway

Company, 188 Mass. 161, 74 N. E. 298; Carraher *v.* Boston & Northern Street Railway Company, 198 Mass. 549, 85 N. E. 162.
Judgment for the plaintiff.

NOTE.

CONTRIBUTORY NEGLIGENCE IN ATTEMPTING TO CROSS TRACT WITH KNOWLEDGE THAT TRAIN OR STREET CAR IS APPROACHING.

1. Trains—Will Prevent Recovery, 374.
2. Trains—Not Negligence per se, 382.
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1. TRAINS—WILL PREVENT RECOVERY.

It is generally held that there can be no recovery for injuries sustained in an attempt to cross in front of an approaching steam railroad train, where the pedestrian, or driver or other occupant of a vehicle, knew that the train was approaching before making the attempt and was merely mistaken as to his ability to cross before the arrival of the train at the place of the collision.

Alabama.—Central of Georgia Ry. Co. *v.* Forshee, 18 Am. & Eng. R. Cas., N. S., 467, 125 Ala. 199; Memphis & Charleston R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231; Robinette *v.* Alabama G. S. R. Co. (Ala.), 1 R. R. R. 236, 24 Am. & Eng. R. Cas., N. S., 236, 31 So. 18.

Arkansas.—Little Rock, etc., Ry. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169; Louisiana & A. Ry. Co. *v.* Ratcliffe (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255, 115 S. W. 396.

California.—Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651.

Georgia.—Harris *v.* Southern Ry. Co., 129 Ga. 388, 58 S. E. 873; Southern Ry. Co. *v.* Blake, 101 Ga. 217, 29 S. E. 288.

Indiana.—Korrady *v.* Lake Shore, etc., Ry. Co., 131 Ind. 261, 29 N. E. 1069; Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12; Sutherland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. 624.

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Kansas.—Atchison, etc., Ry. Co. *v.* Schriver (Kan.), 33 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267, 103 Pac. 994.

Kentucky.—Craddock *v.* Louisville & N. R. Co., 13 Ky. L. Rep. 18, 16 S. W. 125; Gresham's Adm'r *v.* Louisville & N. R. Co., 15 Ky. L. Rep. 599, 24 S. W. 869; Helm *v.* Louisville & N. R. Co. (Ky.), 33 S. W. 396; Illinois Cent. R. Co. *v.* Willis' Adm'r (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312, 97 S. W. 21; Louisville & N. R. Co. *v.* Molloy's Adm'r (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714, 91 S. W. 685; Louisville & N. R. Co. *v.* Tower's Adm'r (Ky.), 32 R. R. R. 657, 55 Am. & Eng. R. Cas., N. S., 657, 115 S. W. 719; Smith *v.* Louisville & N. R. Co. (Ky.), 30 S. W. 209.

Maine.—Grows *v.* Maine Cent. R. Co., 69 Me. 412.

Maryland.—Baltimore & Ohio R. R. Co. *v.* Mali, 66 Md. 53, 5 Atl. 87.

Massachusetts.—Young *v.* Old Colony R. Co., 156 Mass. 178, 30 N. E. 560.

Michigan.—Potter *v.* Flint & Pere Marquette R. Co., 62 Mich. 22, 28 N. W. 714; Storrs *v.* Grand Trunk W. Ry. Co., 142 Mich. 375, 105 N. W. 764; Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, 61 N. W. 514.

Minnesota.—Carney *v.* Chicago, etc., Ry. Co., 46 Minn. 220, 48 N. W. 912.

Missouri.—Boyd *v.* Wabash Western Ry. Co., 105 Mo. 371, 16 S. W. 909; Duncan *v.* Missouri Pac. Ry. Co., 46 Mo. App. 198; Fox *v.* Missouri Pac. Ry. Co., 85 Mo. 879; Hutchinson *v.* Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683, 93 S. W. 931; Moody *v.* Pacific R. Co., 68 Mo. 470; Porter *v.* Missouri Pac. R. Co. (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342, 97 S. W. 880.

New Jersey.—Burnett *v.* Eastern & A. R. Co. (N. J.), 10 Am. & Eng. R. Cas., N. S., 469, 61 N. J. L. 373; Green *v.* Erie R. Co. (N. J.), 19 Am. & Eng. R. Cas., N. S., 308; Hanson *v.* Pennsylvania R. Co. (N. J.), 12 Am. & Eng. R. Cas., N. S., 404.

New York.—Mackey *v.* New York Cent. R. Co. (N. Y.), 27 Barb 529; Wilds *v.* Hudson, 29 N. Y. 315.

North Dakota.—West *v.* Northern Pac. Ry. Co. (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655, 100 N. W. 254.

Ohio.—Lake Shore, etc., Ry. Co. *v.* Geiger, 86 Ohio Cir. Ct. Rep. 41.

Pennsylvania.—Aiken *v.* Pennsylvania R. Co., 130 Pa. 380, 18 Atl. 619; Allen *v.* Pennsylvania R. Co. (Pa.), 12 Atl. 493; Born *v.* Philadelphia & R. R. Co. (Pa.), 48 Atl. 263, 22 Am. & Eng. R. Cas., N. S., 723; Kelly *v.* Pennsylvania R. Co. (Pa.), 8 Atl. 856; McNeal *v.* Pittsburgh, etc., Ry. Co., 131 Pa. 184, 18 Atl. 1026; Myers *v.* Baltimore & O. R. Co., 150 Pa. 386, 24 Atl. 747.

South Carolina.—Griskell *v.* Southern Ry., 81 S. Car. 192, 62 S.

E. 205; Drawdy *v.* Atlantic Coast Line R. Co. (S. Car.), 27 R. R. R. 523, 50 Am. & Eng. R. Cas., N. S., 523, 58 S. E. 980.

Vermont.—Guilmont's Adm'r *v.* Central Vt. Ry. Co., 78 Vt. 185.

Virginia.—Baltimore & O. R. Co. *v.* Few's Ex'r, 94 Va. 82, 26 S. E. 406; Chesapeake & O. Ry. Co. *v.* Hall's Adm'r (Va.), 32 R. R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638, 63 S. E. 1007; Mark's Adm'r *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299; New York, etc., R. Co. *v* Kellam's Adm'r, 83 Va. 851, 3 S. E. 703; Smith's Adm'r *v.* Norfolk & W. Ry. Co. (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715, 60 S. E. 56.

Washington.—Cable *v.* Spokane, etc., R. Co. (Wash.), 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206, 97 Pac. 744; Woolf *v.* Washington R. & Nav. Co., 37 Wash. 491, 79 Pac. 997.

West Virginia.—Riedel *v.* Wheeling Traction Co. (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768, 61 S. E. 821.

Wisconsin.—Dullea *v.* Chicago & N. W. R. Co., 86 Wis. 173, 56 N. W. 477; Groesback *v.* Chicago, etc., R. Co., 93 Wis. 505, 67 N. W. 1120; Langhoff *v.* Milwaukee, etc., Ry. Co., 23 Wis. 43.

It is negligence per se for an adult to attempt to cross before a moving train, with full knowledge of his surroundings, unless compelled to do so to avoid impending danger. So held in Louisiana & A. Ry. Co. *v.* Ratcliffe (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas, N. S., 255, 115 S. W. 396.

In Drawdy *v.* Atlantic Coast Line R. Co. (S. Car.), 27 R. R. R. 523, 50 Am. & Eng. R. Cas., N. S., 523, 58 S. E. 980, it is held that a person who knew that a train was approaching a crossing, and had ample opportunity to observe its proximity, speed, and the extreme hardihood of attempting to cross in front of it, but made the attempt and was killed, was guilty of contributory negligence warranting a nonsuit.

In Burnett *v.* Eastern & A. R. Co. (N. J.), 10 Am. & Eng. R. Cas., N. S., 469, 61 N. J. L. 373, it is held that a railroad company is not responsible for injuries received by a person who unsuccessfully attempts to cross its track in advance of a train which he knows is approaching the place of crossing.

Misjudging Speed.—If a highway traveler, seeing a train approaching, misjudges its speed, or, for any other cause, his own ability to cross the track before it reaches the point of crossing, and attempts to cross, and is struck by the train and injured, he is guilty of contributory negligence. So held in Central of Georgia Ry. Co. *v.* Forshee, 18 Am. & Eng. R. Cas., N. S., 467, 125 Ala. 199.

Same.—In Illinois Cent. R. Co. *v.* Willis' Adm'r (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312, 97 S. W. 21, it appears that deceased either saw or heard the train by which he was struck approaching, and thought he could cross ahead of it, but, miscalculating the speed of the train, he was struck and killed. It

was held that he was guilty of contributory negligence as matter of law.

Obviously Reckless.—In Chicago, etc., R. Co. *v.* McElhaney, 87 Ill. App. 420, it is held that where a person's conduct has been so reckless that the minds of all fair-minded people must conclude that he was acting unreasonably in trying to cross the track before a train he saw approaching, and he was injured by it, there can be no recovery for his injury against the railroad company.

Driving on Crossing.—Persons who drive on a crossing in front of a moving train are guilty of contributory negligence. So held in Born *v.* Philadelphia & R. R. Co. (Pa.), 48 Atl. 263, 22 Am. & Eng. R. Cas., N. S., 723.

Same.—Where decedent, when approaching the railroad crossing at which he was killed, looked around before going on the track, and saw the train but drove directly on the crossing, and urged his horses over the same, he was guilty of contributory negligence as a matter of law. So held in Porter *v.* Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 342, 45 Am. & Eng. R. Cas., N. S., 342, 97 S. W. 880.

Driving Buggy.—A person driving in a buggy, who, when at a safe distance from the track, undertook to cross a railroad crossing ahead of a train which he knew was approaching assumed the risk of any resulting injury. Louisville & N. R. Co. *v.* Molloy's Adm'x (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714, 91 S. W. 685.

Train Seen When Forty Rods from Track by Person Seven Yards from It.—In Grows *v.* Maine Cent. R. Co., 69 Me. 412, plaintiff stated in his declaration that he, being in a narrow fenced lane leading to a crossing over defendant's railroad, and distant about 2½ rods from its track and perceiving a train 40 rods from, but approaching the crossing, he, being 7 yards therefrom, attempted to cross in front of the train, but was injured by it. It was held that on such a statement of facts that he was not entitled to recover.

Walking Forty Feet without Looking Again after Seeing Car Hundred and Twenty Feet Distant—Reliance on Stop at Station.—In Cranch *v.* Brooklyn Heights R. Co., 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610, 186 N. Y. 310, 78 N. E. 1078, it appears that a pedestrian, intending to take passage on a train at a station, was struck by a train that did not stop there. No warning was given that the train would not stop, and trains customarily stopped at the station, and such fact was known to the pedestrian. The pedestrian first saw the train about 700 or 800 feet from the station. She next saw it about 120 feet from her, and instead of attempting to cross there, she walked a distance of 35 or 40 feet to a place at or near the center of a street and without looking for the approaching train she stepped on the track and was injured. While walking the distance of 35 or 40 feet she was in a place of safety and could, at every instance, have commanded a full view of the approaching train. It was held that she was guilty of contributory negligence as a matter of law.

Note

Stopping on Track to Pick Up Something She Had Dropped.—In Hutchinson *v.* Missouri Pac. Ry. Co. (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683, 93 S. W. 931, it appears that deceased, knowing that a train was approaching and in close proximity to her, stepped on the track in front of it, and while pausing there to pick up something she had dropped, was immediately struck and killed. It was held that this evidence sustained a finding that she was guilty of contributory negligence.

Burdened Man Twenty Feet from Crossing When Train Sixty Feet from It—Looking Again When Four Feet from Crossing—Four Miles an Hour.—In Gulf, etc., Ry. Co. *v.* Wilson (C. C. A.), 59 Fed. Rep. 589, it appeared that plaintiff, who was carrying a stick of lumber, started towards a railroad crossing and when about twenty feet from it saw a train about 60 feet from and approaching the crossing. He looked again when within four feet of the track, and stepped upon the track and was injured by the train. When he first saw the train its speed was 4 miles an hour, and its engine was supplied with neither air brakes nor sand, and there was no attempt to stop the train until after the accident. It was held that plaintiff was guilty of contributory negligence.

Train Hundred Yards Distant—Whipped Up Horses.—In Allen *v.* Pennsylvania R. Co. (Pa.), 12 Atl. 493, it appeared that plaintiff, who was a stranger in the neighborhood, stopped before reaching the crossing at a point where he could not see the track, and then drove on, and when he saw the train 100 yards away whipped up his horses, and was struck by the train. It was held that a nonsuit was properly granted.

Train Fifty Five Rods Distant—Buggy Hundred and Seventy Five Feet from Track.—In Dullea *v.* Chicago & N. W. R. Co., 86 Wis. 173, 56 N. W. 477, it appears that while driving along a highway towards defendant's track, plaintiff crossed a bridge, and, when 53 feet from the end of the bridge and 175 feet from the track, he saw a train about 55 rods distant approaching at high speed, he walked his horse to the end of the bridge, in compliance with a notice thereon, and then drove as fast as he could to the track, and his buggy was struck by the train and he was injured. He might have, before reaching the track, turned into a side road which ran nearly parallel with the track. It was held that he was guilty of contributory negligence in deliberately attempting to cross the track in front of the train.

Knowledge of High Speed of Approaching Train—View Obstructed until within Eight Feet of Track—Collision with Wagon.—In West *v.* Northern Pac. Ry. Co. (N. Dak.), 12 R. R. R. 655, 35 Am. & Eng. R. Cas., N. S., 655, 100 N. W. 254, it appeared that plaintiff's servant approached a railroad crossing with which he was familiar, with his horses on a trot, knowing that a train was approaching at a high rate of speed and was very near the crossing, and that a view of

the train was obstructed by buildings and cars from a point 127 feet back from the track until he arrived within 8 feet thereof. But for the noise of his wagon, he could have heard the train in time to have avoided a collision with it. It was held that he was guilty of contributory negligence, preventing a recovery.

Train Short Distance Away—Attempt by Woman.—In Young *v.* Old Colony R. Co., 156 Mass. 178, 30 N. E. 560, it appeared that a woman attempted in broad day light to cross tracks in front of an approaching train, which she saw and was only a short distance away, before she made such attempt, and was struck by the engine and injured. It was held that she could not recover.

View of Driver Obstructed until Near Track.—Where plaintiff's view was obstructed while he was approaching a railroad crossing until he was within a short distance thereof, and he drove on the track without stopping, making an attempt after he saw the train, to cross in front of it, he was guilty of contributory negligence. So held in Robinette *v.* Alabama G. S. R. Co. (Ala.), 1 R. R. R. 236, 24 Am. & Eng. R. Cas., N. S., 236, 31 So. 18.

View Unobstructed for Considerable Distance—Whipping Up Team.—In Woolf *v.* Washington R. & Nav. Co., 37 Wash. 491, 79 Pac. 997, it is held that one who drives a team upon a crossing at a point where for a considerable distance he has an unobstructed view of an approaching locomotive, is guilty of contributory negligence as a matter of law, if he drives on the crossing, either without looking or listening or whips up his horses in an endeavor to drive over the tracks ahead of the engine.

Train Two Hundred Feet from Crossing When Horse Six Feet from Nearest Rail—Fifty Miles an Hour—Position of Danger.—In Getman *v.* Delaware, etc., R. Co., 162 N. Y. 21, 56 N. E. 553, it is held that the fact that deceased was in a position of danger before he went on the railroad track is not sufficiently shown where the undisputed evidence shows that he was in good health, entirely familiar with the crossing, was driving a gentle horse at a walk, or slow trot, and saw the train by which he was struck approaching at a speed of from forty to fifty miles an hour when it was still two hundred feet from the crossing, and when the head of his horse was within six feet of the nearest rail, and there was nothing in the surroundings to confuse him, and the circumstances indicated that he first intended to jump from the wagon and then changed his mind and whipped up his horses in order to cross in front of the train.

Knowledge That Fast Train Is Due.—In Farve *v.* Louisville & N. R. Co. (C. C.), 42 Fed. Rep. 441, it is held that if a person knows that a fast train is due, but goes upon the track, and is struck by the train, he is guilty of contributory negligence precluding recovery for his injuries or death.

Attempt to Run from House to Depot upon Hearing Train—Forty Miles an Hour.—In Boyd *v.* Wabash Western R. Co., 105 Mo.

371, 16 S. W. 909, it appeared that deceased, on hearing the approach of the train, started from his house to the depot on a run, and never stopped to observe the train, which was running forty miles an hour, but attempted to cross the track in front of it, and was killed. It was held that there could be no recovery.

Mistake as to Direction of Train Heard Approaching.—In Chesapeake & O. Ry. Co. *v.* Hall's Adm'r (Va.), 32 R. R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638, 63 S. E. 1007, it is held that decedent was guilty of contributory negligence, precluding recovery for her death, caused by being struck by an east-bound train while attempting to drive across the track when she knew that a train was approaching, though, on hearing that the train was approaching, she believed that it was west-bound, where she could see the track east of the crossing for more than one-fourth mile, the train was rumbling and apprised others in the neighborhood of its approach, and she did not look down the track west of the crossing, though, had she done so, she could have seen the train from 680 to 3,000 feet away.

Crossing in Cut—Whistle Heard and Steam Seen—Whipped up Horses—Train of Flat Cars Pushed by Engine.—In Storrs *v.* Grand Trunk W. Ry. Co., 142 Mich. 375, 105 N. W. 764, it appeared that plaintiff, with knowledge that construction work was being done on the railroad, approached a crossing in a cut and heard the whistle and saw the steam from an approaching engine, but without stopping to look or listen whipped up his horses and attempted to cross the track ahead of the train, and was injured. It was held that a verdict should have been directed for defendant on the ground of contributory negligence, though the train was one of flat cars being pushed ahead of the engine.

Flagman's Warnings Disregarded by Driver of Buggy.—Where a person attempts to drive a buggy over a railroad crossing in an attempt to beat a train over the crossing, in disregard of the warnings of the flagman, and is killed by the train, there can be no recovery for his death. So held in Chicago, etc., R. Co. *v.* Nicholas, 74 Ill. App. 197.

Team Startled by Whistle When Three Rods from Crossing—Dangerous Alternative.—In Potter *v.* Flint & Pere Marquette R. Co., 62 Mich. 22, 28 N. W. 714, an action to recover damages on account of defendant railroad's alleged negligence in not giving crossing signals, and not having a sign at a crossing, it appeared that plaintiff was riding with another person, who drove along a highway for 40 or 50 rods in sight of the railroad track, which is gradually approached and finally intersected at such crossing, and that another party crossed the track just in time to avoid an approaching train, the whistle of which startled the horses drawing the vehicle in which plaintiff was riding when three or four rods from the crossing, but the driver let them go forward, thinking it the safer course to pursue and hoping to avoid a collision with the

train, which struck his vehicle, and caused an injury to plaintiff. It was held that the case was properly taken from the jury on account of plaintiff's gross negligence.

Killed by Engine on Fourth Track after Crossing in Front of Train on Second Track—Knowledge of Conditions.—In Walker *v.* Kinnare, 76 Fed. Rep. 101, it appeared that deceased, coming from the north, reached the crossing just as a train reached it from the west on the second track, and, in order to cross in front of it, turned, and ran southeasterly diagonally over the street and first two tracks, and in front of the engine. He then crossed the third track, and was killed by an engine on the fourth track, also coming from the west, a little behind the engine of the train. It was quite dark at the time, rain and snow falling, and deceased was familiar with the locality and the frequency with which trains passed. It was held that his negligence contributed to his death.

Struck by Another Train.—In Green *v.* Erie R. Co. (N. J.), 19 Am. & Eng. R. Cas., N. S., 308, it appeared that G., while standing on his open wagon, loaded with stone, in his effort to drive ahead of a west bound train which he saw moving towards him, about three hundred feet away, attempted to cross defendant's double tracks at a highway crossing, and was struck and injured by an east-bound express train moving towards him at a high rate of speed, but which an intervening hill prevented him, after reaching the tracks, from seeing until it was about 400 feet from him. It was held that he was clearly guilty of contributory negligence productive of his injury.

Several Tracks—Struck by Train after Turning Back to Avoid Another.—In Sutherland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. 624, it appeared that plaintiff, when attempting to cross several railroad tracks, saw a train approaching and turning back to avoid it, saw a train coming from the opposite direction upon another track which she thought she could pass over before it would reach her, and was struck by the latter train. It was held that her contributory negligence prevented recovery.

Attempt to Cross Tracks of Two Companies—Trains Approaching Side by Side—Knowledge of Unusual Speed.—In Langhoff *v.* Milwaukee, etc., Ry. Co., 23 Wis. 43, an action for killing of plaintiff's intestate by defendants' trains, while she was attempting to cross their two adjacent tracks, it appeared that deceased must have seen and known that two trains were approaching on such tracks side by side, and, with the exercise of any care, must have known that they were running at a much greater rate of speed than usual; and the circumstances were such as would have prevented any prudent person from attempting to pass. It was held that the trial court should have set aside a verdict for plaintiff and ordered a new trial.

Engine Backing into City at Night—Fifteen Miles an Hour—Mere Absence of Switchman from Rear of Tender.—In Smith *v.* Louisville

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& N. R. Co. (Ky.), 30 S. W. 209, it appeared that plaintiff was struck at a crossing by an engine which was backing into the city at night at the rate of fifteen miles an hour. Plaintiff admitted that he saw the engine before he attempted to cross the tracks, but believed he could cross safely. The only negligence charged against the railroad was that a switchman, whose station was on the rear of the tender, was absent from his post at the time of the accident. It was held that a verdict was properly directed for defendant.

Danger Incurred to Save Horse from Train.—In Baltimore, etc., R. Co. *v.* Driskell, 101 Ill. App. 137, it is held that where a person leaves a place of safety, in order to save his horse from being struck by a train he sees approaching the crossing, and is run over and killed by the engine, such reckless exposure will prevent recovery for his death.

Boy's Foot Caught—Failure to Stop Train at Crossing, as Required by Statute.—In Greshman's Adm'r *v.* Louisville & N. R. Co., 15 Ky. L. Rep. 599, 24 S. W. 869, it appeared that plaintiff's intestate, a boy 12 years old, started from defendant railway company's platform to cross the track, but his foot caught so that he fell, and before he could get up he was run over by a train. He evidently saw the train coming rapidly, and close at hand, but thought he could cross in safety, and could have done so had he not fallen. It was held that though the train failed to stop at the crossing, as required by statute, which prevented him from having time to recover and cross, the railroad was not liable because of deceased's contributory negligence.

Express Train Mistaken for Local—Reliance on Stop at Station.—Where persons approaching an electric railway crossing saw a train approaching, but supposed it was a local train which would stop at a station which it would pass shortly before reaching the crossing, while in fact it was an express which did not stop there, and they drove on the crossing without stopping and collided with the train, they were negligent, and a recovery for their injuries was barred. So held in Cable *v.* Spokane, etc., R. Co. (Wash.), 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206, 97 Pac. 744.

2. TRAINS—NOT NEGLIGENCE PER SE.

But there are decisions to the effect that it is not negligence per se to make an unsuccessful attempt to cross in front of an approaching train, but that the question depends upon the circumstances, and if they are such as would not deter an ordinarily prudent person from making the attempt, it does not constitute contributory negligence.

United States.—Cobleigh *v.* Grand Trunk Ry. (C. C.), 75 Fed. Rep. 247; Houston & T. C. R. Co. *v.* Laskowski (C. C. A.), 47 Fed. Rep. 59.

Note

Illinois.—Baltimore, etc., Ry. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197.

Iowa.—Dieckmann *v.* Chicago, etc., Ry. Co. (Iowa), 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346, 121 N. W. 676.

Ohio.—C. C. & I. Ry. Co. *v.* Reiss, 13 Ohio Cir. Ct. Rep. 405.

Oregon.—Wolf *v.* City Ry. Co. (Ore.), 27 R. R. R. 213, 50 Am. & Eng. R. Cas., N. S., 213, 91 Pac. 460.

Texas.—St. Louis, etc., Ry. Co. *v.* Mathews, 34 Tex. Civ. App. 302, 79 S. W. 71.

In Chicago, etc., R. Co. *v.* Ptacek (Ill.), 10 Am. & Eng. R. Cas., N. S., 481, it is held that a requested instruction to the effect that plaintiff could not recover, if the jury found that decedent was killed while trying to cross the tracks at a railroad crossing, after the gates were down, in front of an approaching train, was properly modified by the additional clause after the words approaching train, "and that in so doing she was guilty of lack of ordinary care," such an attempt not being negligence per se but a question of fact.

Apparently Sufficient Time.—It is not contributory negligence, as a matter of law, for one to attempt to cross a track in front of a train which he sees approaching, if he has, apparently, a reasonable time in which to cross. So held in Baltimore, etc., Ry. Co. *v.* Keck, 185 Ill. 400, 57 N. E. 197.

Relative Distance of Person and Train from Crossing.—In Dieckmann *v.* Chicago, etc., Ry. Co. (Iowa), 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346, 121 N. W. 676, it is held that one is not in all cases negligent as a matter of law, in crossing a track with knowledge of the approach of a train, the question depending upon the relative distance of the person and the train from the crossing and other circumstances; and if it is so near and going so fast, that one should know, as a prudent person, that he could not cross without danger, an attempt to cross is negligence.

Speed of Train to Be Considered.—The fact that a person struck by a train at a crossing saw it approaching before he attempted to cross the track cannot be made conclusive as to his contributory negligence by the charge to the jury, regardless of the rate of speed or the manner in which the train was run. So held in St. Louis, etc., Ry. Co. *v.* Mathews, 34 Tex. Civ. App. 302, 79 S. W. 71.

Collision with Vehicle.—That a person killed in a railroad crossing collision drove upon the track knowing the train was approaching does not conclusively establish his negligence. Stearns *v.* Boston & M. R. R. (N. H.), 32 R. R. R. 55, 55 Am. & Eng. R. Cas., N. S., 55, 71 Atl. 21.

Whistle Heard in Time to Avoid Danger.—In C. C. & I. Ry. Co. *v.* Reiss, 13 Ohio Cir. Ct. Rep. 405, it is held that a court is not justified in charging that if plaintiff heard the whistle of the train by which he was injured while at a sufficient distance from the crossing to have stopped his horses in time to prevent the collision,

Note

and did not stop, he was guilty of contributory negligence, since the whistling might have been heard when the train was so far away that a prudent man would believe that he could cross in safety.

Ignorance of Direction Train Is Running—View of Track Obstructed in One Direction.—In Griffin *v.* Chicago, R. I. & Pac. Ry. Co., 68 Iowa 638, 27 N. W. 792, it was held that one who is approaching a railroad track driving a team, knowing that a train is coming, but not the direction it is running, and is unable to have a view of the track in one direction, is negligent in attempting to cross the track, unless he exercises sufficient care to determine that the train is not on the part of the track concealed from his view, within a distance which would deter a man of ordinary prudence from attempting to cross the track.

Team Delayed by Raised Track—Absence of Contributory Negligence—Pleading.—In Philbin *v.* Denver City Tramway Co. (Colo.), 85 Pac. 630, it is held a complaint alleging that while a driver of an ordinary vehicle was attempting to drive across a street railway ahead of a car approaching up a steep grade he was detained because the tracks were raised six inches above the level of the street, but that he did not know and had no reason to believe that the horse drawing the wagon would be unable to safely make the crossing, or that the wagon would be detained, negatived any negligence on the part of the driver, on account of the raised track.

Track Straight and View Unobstructed for Mile or More—Lookouts—Forty Miles an Hour—Negligence and No Contributory Negligence.—In Huntress *v.* Boston, etc., R. Co., 66 N. H. 185, 34 Atl. 154, it appeared that decedent was killed while attempting to drive across defendant's railroad in front of a train which was approaching at the rate of 35 or 40 miles per hour. The railroad was straight for a mile or more in the direction from which the train was coming, and the view was unobstructed; and the statutory signals were given. The fireman, being engaged in putting coal in the fire-box, did not see the carriage until too late. The engineer on the other side of the locomotive did not become aware of the danger until notified by the fireman. It was held that it could properly be found that the collision was caused by lack of due care on part of defendants, with no contributory want of due care on the part of decedent. In this case it is said in the opinion: "the knowledge which the defendants may be presumed to have of the fact that persons of ordinary prudence frequently go upon level crossings in front of moving trains, when they would wait for the trains to pass if they had long been employed as railway managers or trainmen, is the knowledge of the danger caused by high speed and common misapprehensions and miscalculations. The defendants, presumably aware of this customary danger and its cause, are bound to act upon their superior knowledge, and take such pre-

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cautions as men of ordinary prudence would take, under the circumstances, in their situation."

Whistle Heard When Two Hundred Feet from Crossing—Reliance on Stop at Station and Signal at Whistling Post.—In Cobleigh *v.* Grand Trunk Ry. (C. C.), 75 Fed. Rep. 247, it appeared that plaintiff, when approaching a crossing near a railroad station, heard a whistle beyond the station, and, when about 200 feet from the crossing, stopped, as he testified, and looked for the train, and then concluded that it had stopped at the station, which at the time was obscured by falling snow. Thinking that he could easily pass before the train could start up and reach the crossing or the whistling post, where he might expect a signal, he drove on without looking again, and was struck by a fast train which had not stopped at the station or signaled at the whistling post. It was held that the question of his contributory negligence was for the jury.

Obstructed View—Crossing Reached by Train in Less than Two Seconds—Fifteen Miles an Hour and No Signals.—In Lowden *v.* Pennsylvania Co., 41 Ind. App. 614, it is held that where it appears that a person attempted to cross a street upon which there was a railroad track and across which street, diagonally, a street railway track; that when such attempt to cross was made a street car crossed the railroad track, to some extent obstructing her view, and making much noise; that there were other street cars and wagons in the vicinity; and that when she arrived on the steam railroad track and first observed the train approaching which injured her, it was running fifteen miles an hour, without signal, and reached her in 1 4-11 seconds, the question of her contributory negligence was for the jury.

3. MUST YIELD RIGHT OF WAY TO TRAIN.

A pedestrian, or driver of a vehicle, must yield the right of way to a train which he sees approaching from such a short distance or so rapidly, or under such other circumstances as would render it in the least doubtful, to a reasonably prudent man, whether he could cross in safety. Southern Ry. Co. *v.* Carroll (C. C. A.), 138 Fed. Rep. 638, 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488; Black *v.* Burlington, etc., Ry. Co., 38 Iowa 515; Wilson *v.* Southern Pac. Co., 13 Utah 352, 44 Pac. 1040.

A traveler approaching a railroad crossing is bound to give way to a train which is in sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety. So held in Southern Ry. Co. *v.* Carroll (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488, 138 Fed. Rep. 638.

In Smith's Adm'r *v.* Norfolk & W. Ry. Co. (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715, 60 S. E. 56, it is held that where a highway traveler is warned of the near approach of a railroad train it is his duty to keep off the track until the train

has passed, and to go on the track under such circumstances is negligence defeating a recovery for injuries inflicted in the resulting collision.

Possibility of Crossing in Safety Uncertain.—In Southern Ry. Co. *v.* Carroll (C. C. A.), 138 Fed. Rep. 638, 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488, it is held that one approaching a crossing must give way to a train which is within sight or hearing, and moving so rapidly as to make it doubtful whether he can cross in perfect safety.

4. STREET CARS—HELD CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

It has been frequently decided as a matter of law, that it is contributory negligence to make an unsuccessful attempt to cross street railway tracks with knowledge that an approaching car is but a very short distance away.

Louisiana.—Riley *v.* Shreveport Traction Co., 114 La. 135.

Maryland.—Heying *v.* United Rys. & Elec. Co., 100 Md. 281; McNab *v.* United Rys. Co., 94 Md. 719; Merdling *v.* United Rys. Co., 97 Md. 73.

Massachusetts.—Halloran *v.* Worcestor Consol. St. Ry. Co. (Mass.), 78 N. E. 381.

Michigan.—Hilts *v.* Foote, 125 Mich. 241, 84 N. W. 139; Mott *v.* Detroit, etc., Ry. Co. (Mich.), 15 Am. & Eng. R. Cas., N. S., 113.

Missouri.—Bunyan *v.* Citizens' Ry. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 246; Reno *v.* St. Louis, etc., Ry. Co., 180 Mo. 469; Roenfeldt *v.* St. Louis & S. Ry. Co. (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470, 79 S. W. 706; Watson *v.* Mound City St. Ry. Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 385.

New Jersey.—Schwanewede *v.* North Hudson County Ry. Co. (N. J.), 4 R. R. R. 191, 27 Am. & Eng. R. Cas., N. S., 191, 51 Atl. 696.

New York.—Cranch *v.* Brooklyn Heights R. Co., 186 N. Y. 310, 21 R. R. R. 610, 44 Am. & Eng. R. Cas., N. S., 610, 78 N. E. 1078.

Oregon.—Wolf *v.* City, etc., Ry. Co. (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210, 78 Pac. 668.

Pennsylvania.—Blaney *v.* Electric Traction Co. (Pa.), 10 Am. & Eng. R. Cas., N. S., 560; Thomas *v.* Citizens' Pass. Ry. Co., 132 Pa. 504, 19 Atl. 286; Tyson *v.* Union Traction Co., 199 Pa. 264.

Washington.—Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

Wisconsin.—Goldman *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 14 R. R. R. 582, 37 Am. & Eng. R. Cas., N. S., 582, 101 N. W. 384; Watermolen *v.* Fox River Elect. Ry. & P. Co., 110 Wis. 153, 85 N. W. 663.

Obvious Danger.—One who attempts to cross a street at a public crossing ahead of an approaching street car, when the danger is so obvious that reasonable men could not differ in opinion about

it, assumes the risk of injury by being struck by the car. So held in Riedel *v.* Wheeling Traction Co. (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768, 61 S. E. 821.

Pedestrian.—Where street cars are approaching a pedestrian in plain view, and he recklessly assumes the risk of crossing the track in front of them and is struck by them, he is guilty of negligence. So held in Bunyan *v.* Citizens' Ry. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 246.

Pedestrian Relying upon His Speed.—In Blaney *v.* Electric Traction Co. (Pa.), 10 Am. & Eng. R. Cas., N. S., 560, it appeared that deceased, while attempting to cross a street, stopped within four feet of the nearest street railway tracks to let a car going west pass, and then, without stopping, crossed those tracks and the space, about four feet in width, between the north and south tracks, and was struck and killed by defendant's car going west. Witnesses testified that he cut cater-cornered across the tracks, apparently relying upon his speed to take him across before the arrival of the east-bound car. It was held that his death was the result of his own negligence.

Apparent That Motorman Does Not Respect Your Rights.—If it appears that a trolley car motorman is not going to respect your right to cross the street first, you must wait, or you are guilty of contributory negligence if struck by the car. So held in Schwanewede *v.* North Hudson County Ry. Co. (N. J.), 4 R. R. R. 191, 27 Am. & Eng. R. Cas., N. S., 191, 51 Atl. 696.

Rapidly Approaching Electric Car.—In Christensen *v.* Union Trunk Line, 6 Wash. 75, 32 Pac. 1018, it is held that where one attempts to drive across a track in front of a rapidly approaching electric car, with knowledge of its approach, and his team is struck and injured by the car, he cannot recover on account of his contributory negligence.

Whipping Up Team.—In Mott *v.* Detroit, etc., Ry. Co. (Mich.), 15 Am. & Eng. R. Cas., N. S., 113, it is held that a driver, seeing a street car approaching, is guilty of contributory negligence per se in urging his horse upon the track when the car is so near that it strikes his vehicle.

Failure to Look until Very Near Car—Whipping Up Horse—Dangerous Alternative.—In Hilts *v.* Foote, 125 Mich. 241, 84 N. W. 139, it appeared that the driver of a milk wagon invited deceased to ride with him. He drove his wagon at a speed of between five and six miles an hour from one street across another, along which defendant had an electric railway with a single track. He did not check the speed of his horse upon approaching the track, or look for approaching cars until he was so near the track that he thought the safest way was to attempt to cross before a car, which he then saw, would reach him. And, instead of stopping, he whipped up his horses; and, when his wagon was on the track, it was struck by the car, and deceased was killed. The driver had am-

ple time to look for the car, stop, and thus avoid the collision. It was held that the driver's contributory negligence prevented recovery for the death of deceased.

Car Only Block Distant—Full Speed—Collision with Wagon.—It is contributory negligence to attempt to drive a wagon over a street crossing in front of a street car which the driver sees approaching at full speed and only a block away, when such attempt results in a collision between the car and the wagon. So held in Goodman *v.* West Chicago, etc., R. Co., 101 Ill. App. 474.

Car One Block Distant—Horse Fifteen Feet from Track—Very Low Rate of Speed.—In Goldman *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 14 R. R. R. 582, 37 Am. & Eng. R. Cas., N. S., 582, 101 N. W. 384, it appeared that plaintiff was driving south, and came to a cross-street on which the defendant street railroad had double tracks. As he reached a point where he was substantially on the north crosswalk of the street, and his horse's head some fifteen feet north of the track, he stopped, and looked west, and saw no car; then looked east, and saw one about a block away, coming toward him very slowly. He started his horse at a speed of about two miles an hour to cross the street without again looking for a car, when his horse was on the track, and the front wheels close to the north track, his little daughter cried out to look out for the car. He then looked and saw it about half a block away, coming very rapidly. He urged his horses to greater speed, reaching a rate of about three miles an hour, but before getting across was struck and injured. It was held that plaintiff was guilty of contributory negligence precluding recovery.

Car Seen Two Hundred Feet from Place of Collision—No Brake on Wagon.—In Roenfeldt *v.* St. Louis & S. Ry. Co. (Mo.), 13 R. R. R. 470, 36 Am. & Eng. R. Cas., N. S., 470, 79 S. W. 706, it appeared that plaintiff was driving down a grade of 3 per cent, approaching a street railroad, his horse going at a slow walk, when he saw a street car approaching at about nine miles an hour. There was no brake on plaintiff's wagon, and he drove on the tracks without stopping or attempting to turn out, and a collision ensued. The crossing was level, and when plaintiff first saw the car it was about 250 feet from the point of contact. It was held that he was guilty of contributory negligence.

Duty Not to Run Car into Person—Attempt to Cross Street Diagonally with Knowledge of Danger.—In Rider *v.* Syracuse R. T. Ry. Co., 171 N. Y. 139, 63 N. E. 836, it is held that the rule that a railroad company must not run a train or car into a person, though he is on the track through his own negligence, is not applicable where a driver attempts to cross a street car track diagonally when he knows that an approaching electric car is so near as to render the attempt dangerous.

Attempt to Cross Street Diagonally in Direction from Which Car Approached.—Plaintiff, driving a wagon, saw a street car ap-

proaching from considerable distance, and instead of driving across the track after leaving an intersecting street, turned to the left of the street he was on, drove a few feet, and then turned to the right, and sought to cross the street diagonally in the direction from which the car was approaching, and the result was a head-on collision. It was held that he was guilty of contributory negligence. Riley *v.* Shreveport Traction Co., 114 La. 135.

Woman Sixty Years Old.—In Rene *v.* St. Louis, etc., Ry. Co., 180 Mo. 469, it is held that a woman sixty years old, in the full possession of her faculties, who undertakes to cross a street railway track near a crossing when she sees a car approaching, and is struck by the car, is guilty of contributory negligence.

Collision with Load of Hay on Last Track.—In Tyson *v.* Union Traction Co., 199 Pa. 264, it appeared that plaintiff drove a two-horse team, drawing a load of hay, from a yard out upon a street forty feet wide; that defendant had two tracks upon the street and a space of more than twelve feet was left upon each side between the curb and nearest rail. When he drove out of the yard, he stopped his team with the front wheels resting in the gutter, and he was upon the east side of the street, intending to go north. He looked and saw a car approaching from the north, upon the track farthest from him, and he testified that he thought the car was far enough away to permit him to drive across both tracks before it reached him. He started his team to go directly across, and when his front wheels were on the last track, the wagon and car collided, causing injury to plaintiff. It was held that plaintiff was guilty of contributory negligence.

Driver of Street Sprinkler Injured—Motorman Chargeable with Notice of Peril.—In DeLeon *v.* Kokomo City St. R. Co., 22 Ind. App. 377, 53 N. E. 847, it appeared that the driver of a street sprinkler, in attempting to cross in front of an approaching street car, miscalculated the time it would take him to cross and get out of the way, and was struck by the car. It was held that his contributory negligence was the proximate cause of his injury, although the motorman should have seen his peril in time to have avoided the collision.

Woman Driving Wagon on Dark Morning.—In Heying *v.* United Rys. & Elec. Co., 100 Md. 281, it appeared that plaintiff, a woman, driving a wagon on a dark morning in midwinter, came to the tracks of defendant's electric street railway. She saw a car coming, but thinking there was time to cross, attempted to do so, and the car ran into the wagon and plaintiff was injured. It was held that plaintiff was guilty of contributory negligence.

Failure to Look Again—Mistake as to Track of Car.—Plaintiff who, after seeing a street car approaching while he was still upon the sidewalk, started to cross a curved track which led into a cross street without again looking, and was struck by a car and injured, was chargeable with contributory negligence as matter of law, and

cannot recover for the injury; nor is he relieved from such negligence by the fact that there was another track which went straight ahead past the corner. So held in Pittsburg Ry. Co. *v.* Cluff (C. C. A.), 26 R. R. R. 539, 49 Am. & Eng. R. Cas., N. S., 539, 149 Fed. Rep. 732.

Wagon Hundred and Thirty Feet from Car—Unusual Speed.—In Watermolen *v.* Fox River Elect. Ry. & P. Co., 110 Wis. 153, 85 N. W. 663, it appeared that the driver of a wagon when within 130 feet of an electric car, which was approaching at the rate of from eight to twelve miles an hour, which was a usual rate of speed, attempted to cross in front of it, and a collision occurred. It was held that he was guilty of contributory negligence as a matter of law.

Wagon Driven Slowly—Rapid Speed of Car—Reliance upon Stop at Crossing.—In Chicago City Ry. Co. *v.* Strampel, 110 Ill. App. 482, it is held that it is contributory negligence to drive a wagon slowly across the track in front of a rapidly approaching street car, relying upon a supposition that the car will stop at the crossing before it reaches the wagon.

Concurrent Negligence in Not Stopping Car.—A pedestrian who knowingly attempts to cross a street railway track in front of moving cars, and so close as to be struck by a car before he can cross, is guilty of contributory negligence, and cannot recover, even if the motorman was guilty of concurrent negligence in not stopping the train. So held in Watson *v.* Mound City St. Ry. Co. (Mo.), 3 Am. & Eng. R. Cas., N. S., 385.

Wagon Shoved Some Distance Along Track by Car—Concurrent Negligence.—In Rider *v.* Syracuse T. Ry. Co., 171 N. Y. 139, 63 N. E. 836, it is held that the rule that a remote negligent act of the injured party does not bar a recovery for the injury is not applicable when one drives upon the track with knowledge that an electric car is approaching at a rate of from six to nine miles an hour and is injured in the resulting collision, where the motorman did not act willfully or carelessly, although the wagon was carried some distance along the track before it was overturned and the injuries inflicted, since the act of the driver and the conduct of the motorman were substantially concurrent, so that the conduct of the injured party in driving upon the track cannot be separated from the injury itself.

Compelled to Stop Vehicle on Track by Passing Trains—Presumption as to Control of Car.—But where a driver approaching a street crossing is compelled to stop on the track by reason of passing trains and an approaching car is a considerable distance away, the driver may presume that the car is under control or will be controlled when the motorman sees him on the track, and that he will not be run into. Keefe *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725, 104 Pac. 774.

Negligence in Running against Wagon Again.—And in McDivitt

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v. Des Moines St. R. Co. (Iowa), 6 Am. & Eng. R. Cas., N. S., 106, it appeared that plaintiff attempted to drive across a street car track before an approaching car, and his wagon was struck and overturned, and he was thrown out. The car stopped immediately after the accident, and then was again moved up against the wagon, striking it and injuring plaintiff, who was in it. It was held that the negligence of plaintiff in attempting to cross in front of the car did not prevent a recovery for the injuries caused by the negligence of defendant in running against the wagon a second time.

5. STREET CARS—GENERAL RULE.

But it may be stated as a general rule that it is not contributory negligence to attempt to cross a street car track with knowledge that a car is approaching, if the relative distance of the car and the pedestrian, or driver of a vehicle, to the point where the attempt is to be made, the apparent speed of the car and other circumstances are not such as to make it a failure to exercise ordinary care to make the attempt.

United States.—Pittsburg Ry. Co. *v.* Cluff (C. C. A.), 149 Fed. Rep. 732, 26 R. R. R. 539, 49 Am. & Eng. R. Cas., N. S., 539.

California.—Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908.

Colorado.—Philbin *v.* Denver City Tramway Co. (Colo.), 85 Pac. 630.

Connecticut.—McCarthy *v.* Consolidated Ry. Co. (Conn.), 63 Atl. 725.

Kansas.—Kansas City-Leavenworth R. Co. *v.* Gallagher (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750, 75 Pac. 469.

Michigan.—McQuisten *v.* Detroit Citizens' St. Ry. Co. (Mich.), 26 R. R. R. 122, 49 Am. & Eng. R. Cas., N. S., 122, 110 N. W. 118.

Missouri.—Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 502.

Nebraska.—Omaha St. Ry. Co. *v.* Mathiesen (Neb.), 18 R. R. R. 509, 41 Am. & Eng. R. Cas., N. S., 509, 103 N. W. 666.

Utah.—Spiking *v.* Consolidated Ry. & P. Co. (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457, 93 Pac. 838.

Washington.—Henry *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721, 104 Pac. 776; Keefe *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725, 104 Pac. 774.

West Virginia.—Ashley *v.* Kanawha Valley Traction Co. (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520, 55 S. E. 1016.

Wisconsin.—Grimm *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665, 119 N. W. 833.

Even though one sees a street car approaching, if, in the exercise of common prudence, he may reasonably think there is time to cross safely, he is not chargeable with negligence in attempting to do so. So held in McQuisten *v.* Detroit Citizens' St. Ry. Co. (Mich.), 26 R. R. R. 122, 49 Am. & Eng. R. Cas., N. S., 122, 110 N. W. 118.

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Attempt by Pedestrian.—It is not contributory negligence for a pedestrian to attempt to cross a street car track in front of an approaching car, if, in doing so, he exercises the judgment and care which a reasonably prudent and careful person would exercise under like circumstances. Ashley *v.* Kanawha Valley Traction Co. (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520, 55 S. E. 1016.

Same.—A pedestrian may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent. If in view of his distance from the car, the rate of his speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross, a pedestrian may do so, and the propriety of his conduct is ordinarily a question for the jury. So held in Kansas City-Leavenworth R. Co. *v.* Gallagher (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750, 75 Pac. 469.

Misjudging Speed and Distance of Car.—In Murray *v.* St. Louis Transit Co., 108 Mo. App. 501, 502, it is held that a person is not necessarily guilty of contributory negligence because, when driving on the track, he misjudges the speed or the distance of an approaching street car.

Essential Findings—Speed of Car Not Excessive—Driving on Track Suddenly with Knowledge of Danger.—To defeat the plaintiff on the ground of contributory negligence in driving upon the track so close to the car which he saw approaching as to render it impossible for its motorman to avert the collision with plaintiff, it was necessary for the jury to find, either that the speed of the car was not excessive, or that he drove on the track so suddenly that the motorman could not save him, and did so negligently, without looking or listening when he knew there was danger. So held in Murray *v.* St. Louis Transit Co., 108 Mo. App. 501.

Car One Block Distant.—A man who sees a street car a block away and drives on the track and is hit by the car is not necessarily guilty of contributory negligence as a matter of law. So held in Henry *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721, 104 Pac. 776.

Half Block Distant—Ordinary Speed.—A traveler approaching a street crossing and seeing a car approaching on a slightly downgrade at an ordinary rate of speed one half a block away is not guilty of contributory negligence as a matter of law in attempting to cross in front of the car. So held in Keefe *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725, 104 Pac. 774.

Ordinary Vehicle—Mutual Rights.—In McCarthy *v.* Consolidated Ry. Co. (Conn.), 63 Atl. 725, it is held that the driver of an ordinary vehicle has the right to attempt to drive across street railway track in front of an approaching car only when he has reasonable grounds for believing that he can cross in safety, where both he

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and those in charge of the car act with reasonable regard to the rights of the other.

Same.—In Omaha St. Ry. Co. *v.* Mathiesen (Neb.), 18 R. R. R. 509, 41 Am. & Eng. R. Cas., N. S., 509, 103 N. W. 666, it is held that if the driver of a vehicle who arrives at a street intersection and sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question of his negligence is one of fact for the jury.

Time to Cross if Car Run at Usual Speed.—A person about to cross a street at a crossing is not bound to wait because a street car is in sight; but if the car is at such a distance that he has time to cross, if it is run at the usual speed, it is not negligence, as matter of law, to attempt to do so. So held in Wolf *v.* City Ry. Co. (Ore.), 27 R. R. R. 213, 50 Am. & Eng. R. Cas., N. S., 213, 91 Pac. 460; Hamilton *v.* Consolidated Traction Co., 201 Pa. 351; Citizens' Rapid Transit Co. *v.* Seigrist, 96 Tenn. 119, 33 S. W. 920.

Vehicle Ten Yards from Crossing When Car Two Hundred Yards Distant.—In Citizens' Rapid Transit Co. *v.* Seigrist, 96 Tenn. 119, 33 S. W. 920, it is held that contributory negligence is not chargeable to the driver of a vehicle that collides with an electric car running at a reckless rate of speed, at a grade crossing, upon a street or highway, where he, from a point only ten yards from the crossing, saw the car approaching rapidly from a distance of 200 to 250 yards, and, believing he had sufficient time to cross the track in safety, proceeded to do so without again looking, assuming that the car would approach the crossing at a lawful rate of speed.

Car Hundred Feet Distant—Team Fifteen Feet from Track—Seventeen Miles an Hour, Instead of Eight.—In Creavin *v.* Newton Street Ry., 176 Mass. 529, 57 N. E. 994, there was evidence from which the jury could find that both plaintiffs looked to see if a car was coming when, seated in a covered express wagon, they were fifteen feet from defendant's street car track; that their view was obstructed until they reached that point; that they saw the car and each thought that it was then one hundred to one and five feet away, and that it was then about one hundred feet away; that they thought they had ample time to cross the track, and for that reason drove across at a walk; and that the car was moving at the rate of fifteen to seventeen miles an hour, instead of eight miles an hour as required by ordinance. It was held that this authorized a finding that plaintiffs thought that the motorman saw them and would look out for them; and that they were in the exercise of due care for their own safety.

Unlawful Rate of Speed Must Be Considered if Observed.—One crossing a street car track in advance of an approaching car is

not guilty of contributory negligence, if, from the standpoint of a person of ordinary care so circumstanced, he had sufficient time, proceeding reasonably, to clear the track without interfering with the movements of the car, assuming that it is moving at a reasonable and lawful rate; but where the car is approaching at an unlawful rate of speed, and it is observable, he must take such speed into consideration. So held in Grimm *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665, 119 N. W. 833.

Car Hundred and Fifty Feet Distant—Ordinary Vehicle.—In Philbin *v.* Denver City Tramway Co. (Colo.), 85 Pac. 630, it is held that one has the right to attempt to drive an ordinary vehicle across street railway tracks between intersecting streets when a car is approaching up a grade at a distance of 150 feet.

Car One Block Distant—Control of Car Lost on Down Grade—Collision with Wagon—Question for Jury.—In Henry *v.* Seattle Elec. Co. (Wash.), 33 R. R. R. 721, 56 Am. & Eng. R. Cas., N. S., 721, 104 Pac. 776, it appeared that plaintiff, when driving a large covered wagon, at the intersection of a street, turned to pass a wagon approaching in the opposite direction. He testified that it was necessary in order to do this to drive on defendant's railway track, and that he intended after passing the wagon, to drive south on the west side of the intersecting street beyond the track. As plaintiff reached the intersection, he saw a car just leaving the parallel street one block north, and, thinking he had time to make the turn before the car reached him, endeavored to do so, but was too late to prevent a collision, which resulted in injury to his team. It also appeared that the car was approaching at a high rate of speed, and the motorman stated that he lost control of the car coming down the hill. It was held that plaintiff was not negligent as a matter of law.

Headlight of Car Seen Three or Four Hundred Yards Distant—Dangerous Speed—Collision with Wagon.—In Metropolitan St. Ry. Co. *v.* Slayman, 64 Kan. 722, 68 Pac. 628, it is held that where the driver of a heavy wagon attempts to drive across street railway tracks at night, and before doing so looks both ways for cars and does not discover one approaching, but does see the headlight of one which he believes to be moving towards him at a distance of 300 or 400 yards, and where the evidence justifies the jury in determining that such car was traveling at an unusual, reckless, and dangerous rate of speed, which fact such driver did not and could not know before starting to drive across such track, and when, by reason of such high rate of speed and the failure of those in charge of the car to make any effort to stop it, such wagon is struck and the driver is injured, the question as to whether the latter was so far guilty of contributory negligence that he may not recover is one of fact for the jury.

Right to Cross Intervening Track to Take Car.—A pedestrian de-

Note

siring to take a street car standing on an opposite track was entitled to hastily cross an intervening track on which a car was approaching, provided he exercised ordinary care for his own safety in view of the surroundings. So held in Spiking *v.* Consolidated Ry. & P. Co. (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457, 93 Pac. 838.

6. LESS CARE REQUIRED BEFORE ATTEMPTING TO CROSS IN FRONT OF STREET CAR.

It has been held that in determining whether it is safe to attempt to cross in front of an approaching street car, one is not required to exercise as must care and prudence as if it were an approaching steam railroad train. Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908; Citizens' Rapid Transit Co. *v.* Seigrist, 96 Tenn. 119, 120, 33 S. W. 920.

Less Care Required than When Crossing in Front of Train.—In Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908, it is held that a traveler attempting to drive cross street railway tracks in front of an approaching car is not required to exercise the very highest prudence and judgment, nor to exercise the same degree of care that is required in crossing a track upon which a heavy steam railroad train is traveling at a high rate of speed. It is sufficient if, in crossing the street railway, he exercises that decree of care and prudence and good sense which, in such circumstances, are exercised by men who possess such qualities in an ordinary or average degree.

7. UNUSUAL SPEED OF TRAIN.

The mere fact that the train was running very fast or at an unusually fast rate of speed will not confer the right to recover for injuries inflicted by it upon one who went on the track with knowledge that it was coming. Gilbert *v.* Erie R. Co. (C. C. A.), 97 Fed. Rep. 747; Little Rock, etc., Ry. Co. *v.* Cullen, 54 Ark. 431, 16 S. W. 169; Harris *v.* Southern Ry. Co., 129 Ga. 388, 58 S. E. 873; Louisville & N. R. Co. *v.* Tower's Adm'r (Ky.), 32 R. R. R. 657, 55 Am. & Eng. R. Cas., N. S., 657, 115 S. W. 719; Langhoff *v.* Milwaukee, etc., Ry. Co., 23 Wis. 43.

Train Seen When Driver One Hundred and Thirty Five Feet from Crossing—Failure to Look again—Speed—Signals.—In Gilbert *v.* Erie R. Co. (C. C. A.), 97 Fed. Rep. 747, an action to recover for death of a person struck by train on defendant's railroad at a crossing, the petition alleged that deceased, while approaching the crossing in a covered buggy, and when 135 feet therefrom, saw the train approaching, and drove upon the crossing, without again looking in that direction. It wes held that this stated such contributory negligence on his part as to preclude any recovery, although it also alleges negligence in running the train at unusual speed, and in failing to give the proper signals.

Note

Fast Special Running on Time of Regular Train.—One who knows and sees that a train is coming, and attempts to cross the track just in front of it at a station, is guilty of contributory negligence, barring recovery, though it is a fast special train running on the time of the regular train which was to stop there. So held in Louisville & N. R. Co. *v.* Tower's Adm'r (Ky.), 32 R. R. R. 657, 55 Am. & Eng. R. Cas., N. S., 657, 115 S. W. 719.

Station Postmaster Killed—Train Twelve Hundred Feet Distant —Great Speed—Reliance upon Stop at Station—Mistaken as to Train.—In Moody *v.* Pacific R. Co., 68 Me. 470, it appeared that deceased was a postmaster at a station on defendant's road, and was in the habit of carrying the mail to one of its mail trains which stopped at the station at about 8:40 P. M. His office was near the station but across the track. He heard a train approaching about the time the mail train usually passed, and picked up his mail bags and started to cross the track to the platform. The train was then 1200 feet distant, but running at great speed. Relying upon its stopping, he continued on his way, and was struck by the engine and killed. The train was a freight train, which, on account of the mail train being behind time, had been ordered to go on without stopping; and it passed such station at the very time the mail train would have passed had it been on time. It was held that he was guilty of contributory negligence which precluded recovery for his death.

8. UNUSUAL SPEED OF STREET CAR.

And this rule applies to injuries inflicted by street cars. Watermolen *v.* Fox River Elect. Ry. & P. Co., 110 Wis. 153, 85 S. W. 663.

9. DANGEROUS SPEED OF TRAIN.

Even the fact that the train was running at excessive and dangerous speed will not render the railroad liable where there was also such contributory negligence on the part of the person making an attempt to cross the track. Little Rock, etc., Ry. Co. *v.* Culien, 54 Ark. 431, 16 S. W. 169; Craddock *v.* Louisville & N. R. Co., 13 Ky. L. Rep. 18, 16 S. W. 125; Moody *v.* Pacific R. Co., 68 Mo. 470; Groesback *v.* Chicago, etc., R. Co., 93 Wis. 505, 67 N. W. 1120.

Pedestrian Struck by Train within Limits of Town—Unreasonable Speed.—In Craddock *v.* Louisville & N. R. Co., 13 Ky. L. Rep. 18, 16 S. W. 125, it appeared that within the limits of a town, but not at a public crossing, plaintiff attempted to cross a railroad track immediately in front of a moving train, which he saw approaching, and was struck by it. It was held that there could be no recovery for his resultant injuries, though the train was running at an unreasonable speed.

10. SPEED PROHIBITED BY ORDINANCE—TRAINS.

Nor will the fact that the train was running at a rate of speed prohibited by an ordinance render the railroad liable. Southern

Note

Ry. Co. *v.* Blake, 101 Ga. 217, 29 S. E. 288; Korrady *v.* Lake Shore, etc., Ry. Co., 131 Ind. 261, 29 N. E. 1069; Lake Erie, etc., R. Co. *v.* Pence, 24 Ind. App. 12; Fox *v.* Missouri Pac. Ry. Co., 85 Mo. 879.

Pedestrian.—In Southern Ry. Co. *v.* Blake, 101 Ga. 217, 29 S. E. 288, it appeared that the train was running within city limits at a rate of speed prohibited by ordinance, and that plaintiff, having seen the train approaching, miscalculated the time within which he could safely cross, and placed himself on the track immediately in front of the engine, was caught by the pilot and injured. It was held that his contributory negligence prevented recovery.

Running to Beat Train to Station—Killed after Jumping from Between Obstructing Cars.—In Griskell *v.* Southern Ry., 81 S. Car. 192, 62 S. E. 205, it appeared that deceased, a young man, upon seeing a fast passenger train approaching a station, started running in order to get to the station before the train, climbed between two coupled freight cars and was killed by the engine of the approaching train as he jumped down from between the cars. It was held that, although he was on a path used by the public by acquiescence of defendant railroad and the train was violating the town ordinance as to speed, and a statute in failing to give crossing signals, deceased's contributory negligence prevented recovery for his death.

11. SAME—STREET CARS.

Nor is the rule different in case on street cars. Wolf *v.* City, etc., Ry. Co. (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210, 78 Pac. 668; Griskell *v.* Southern Ry., 81 S. Car. 193, 62 S. E. 205.

Car within Ten Feet of Pedestrian.—One who in broad daylight stops beside a street car track till the car, approaching at an unlawful speed, is within ten feet of him, when he attempts to cross in front of it, is guilty of contributory negligence, as a matter of law. So held in Wolf *v.* City & S. Ry. Co. (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210, 78 Pac. 668.

12. ASSUMPTION THAT TRAIN'S SPEED IS NOT UNLAWFUL.

A person about to attempt to cross a steam railroad track must not act on the assumption that a train he sees approaching will not approach at excessive or unlawful speed. Kelley *v.* Hannibal & St. Jo. R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; Moody *v.* Pacific R. Co., 68 Mo. 470.

Must Assume Existence of Any Necessary Speed at Country Crossings.—Where a traveler is at an ordinary country railroad crossing and sees an approaching passenger train, he must assume that it may be running at any rate of speed which the business or necessities of the company require, and act accordingly. So held in

Atchison, etc., Ry. Co. *v.* Schriver (Kan.), 33 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267, 103 Pac. 994.

Compared to Engineer's Right to Rely upon Instincts of Self-Preservation.—In Kelley *v.* Hannibal & St. Jo. R. Co., 75 Mo. 138, 13 Am. & Eng. R. Cas. 638, it is held that it is not sufficient to exonerate a party from the charge of contributory negligence in attempting to cross a track in front of an approaching train to show that he might reasonably have supposed that if the engine ran at its usual and lawful rate of speed for that place he could cross without harm, he having no more right to presume that those in charge of the engine would obey the law than they had to believe that he would obey the instincts of self-preservation.

Forty Five Miles an Hour in Excess of Statutory Limit.—In Groesback *v.* Chicago, etc., R. Co., 93 Wis. 505, 67 N. W. 1120, it appeared that plaintiff's intestate was killed while attempting to drive over a highway crossing, by a train running about sixty miles an hour. At any point within 500 feet from the crossing he might have seen the headlight of the engine continuously after it came within three fourths of a mile from the crossing. It was held that although a statute limited the speed of the train when it crossed such highways to fifteen miles an hour, and deceased had the right to act on the assumption that it would not run at greater speed, he was guilty of contributory negligence, either in failing to look at all or in deliberately taking the risk of attempting to cross in front of the train.

13. FAILURE TO GIVE TRAIN SIGNALS.

And, of course, the mere failure to give the proper train signals will not render the railroad company liable for injuries sustained by one in a collision with the train where he knew of its approach before he tried to cross in front of it.

United States.—Chicago, etc., R. Co. *v.* Houston, 95 U. S. 697, 24 L. Ed. 542; Gilbert *v.* Erie R. Co. (C. C. A.), 97 Fed. Rep. 747.

California.—Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651.

Illinois.—Chicago & A. R. Co. *v.* Fears, 53 Ill. 115.

Kansas.—Missouri Pac. Ry. Co. *v.* Trahern (Kan.), 91 Pac. 48.

Kentucky.—Helm *v.* Louisville & N. R. Co. (Ky.), 33 S. W. 396.

New Jersey.—Hanson *v.* Pennsylvania R. Co. (N. J.), 12 Am. & Eng. R. Cas., N. S., 404.

Ohio.—Lake Shore, etc., Ry. Co. *v.* Geiger, 86 Ohio Cir. Ct. Rep. 41.

South Carolina.—Griskell *v.* Southern Ry. Co., 81 S. Car. 192, 62 S. E. 205.

Texas.—Chicago, etc., Ry. Co. *v.* Williams (C. C. A.), 41 S. W. 501; Galveston, etc., Ry. Co. *v.* Haas, 19 Tex. Civ. App. 645, 48 S. W. 540; Houston, etc., R. Co. *v.* Nixon, 52 Tex. 19.

Mere Failure to Give Signals.—In Hanson *v.* Pennsylvania R. Co.

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(N. J.), 12 Am. & Eng. R. Cas., N. S., 404, it is held that the contributory negligence of a person killed by a train while attempting to drive across railroad tracks at a point towards which he saw the train backing before he made the attempt, will bar recovery for his death even though the flagman was careless in giving signal, and the train hands failed to ring the bell or sound the whistle.

Attempt to Run across Track in Front of Train.—Where the testimony of the person injured shows that he saw the train approaching and attempted to run across the track in front of it, in doing which he was struck and injured, he cannot recover, even though there was a failure to sound the train whistle. So held in Helm *v.* Louisville & N. R. Co. (Ky.), 33 S. W. 396.

Smoke Seen When Driver Was Thirty Yards from Crossing—Wagon Struck by Engine.—In Chicago & A. R. Co. *v.* Fears, 53 Ill. 115, an action for injuries received by plaintiff's wagon coming in collision with a train, it appeared that he was approaching a railroad crossing, and when at a distance of thirty yards from the crossing, he saw the smoke of an approaching locomotive, and could have stopped before reaching the track, but did not check the speed of his horses until he reached the track, when the pole of his wagon was struck by it and the wagon was overturned. It was held that he was guilty of such recklessness that he could not recover, even though no train signal was given.

14. FAILURE TO GIVE STREET CAR SIGNALS.

And such rule applies in case of accidents on street car tracks. McNab *v.* United Rys. Co., 94 Md. 719; Merdling *v.* United Rys. Co., 97 Md. 73.

Car Forty Feet Distant—High Speed—Horse on Space between Two Tracks.—In McNab *v.* United Rys. Co., 94 Md. 719, it appeared that a country road crossed at right angles a turnpike road upon which were the double tracks of defendant's electric railway. Plaintiff drove in a phaeton at a trot along the country road to the turnpike, and when slowing down, but not stopping, looked to see if a car was coming from one direction on the track nearest to her. Seeing no car on that track and hearing no gong sounded, she drove across the road and when her horse was on the space between the two tracks she saw a car forty feet distant approaching at a high rate of speed from the other direction. Her horse was gentle and accustomed to the cars and she was then in a place of safety. Instead of stopping or backing, plaintiff whipped up her horse and attempted to cross in front of the car, but it struck the rear wheels of her vehicle, and she was thrown out and injured. It was held that although defendant was negligent in not sounding the gong upon approaching the cross-road, plaintiff's contributory negligence prevented recovery.

Headlight of Car Seen.—In Merdling *v.* United Rys. Co., 97 Md. 73, it appeared that deceased drove slowly, after dark, towards the

tracks of a suburban electric railway. The road lay through open fields and the cars ran there at a high rate of speed. The view was unobstructed and deceased saw the headlight of an appoaching car but, supposing that he could cross in time, continued to drive on as before and a collision occurred which caused his death. There was evidence that a red light was displayed at the crossing which was a signal that the car should stop there before crossing the road, and this signal was disobeyed by the motorman who also neglected to sound the gong. It was held that deceased was guilty of contributory negligence preventing recovery for his death; and that in the absence of any evidence that he saw the red light and knew what it meant as a signal, it could not be assumed that he was misled by it.

15. LOOKOUTS FROM TRAINS, FAILURE TO MAINTAIN.

And it is generally held that the failure of those in charge of the train to maintain a proper lookout for persons on the track will not authorize a recovery for injuries sustained in attempting to cross the track with knowledge of the train's approach. Clark *v.* Bennett, 123 Cal. 275, 55 Pac. 908; Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651; Harris *v.* Southern Ry. Co., 129 Ga. 388, 58 S. E. 873; Duncan *v.* Missouri Pac. Ry. Co., 46 Mo. App. 198; Ellis *v.* Pennsylvania R. Co., 216 Pa. 415.

Absence of Signals and Lookout.—One is guilty of contributory negligence as a matter of law, when injured while crossing a railroad track with a vehicle in front of an approaching train, which he knew was near, and which might have passed without injuring him had he stopped and waited a few seconds, before attempting to cross, although there was negligence in failing to give train signals and in the failure of the fireman to lookout for the train when approaching the crossing. So held in Herbert *v.* Southern Pac. Co., 121 Cal. 227, 53 Pac. 651.

Mere Absence of Watchman.—Where a person approaching a railroad crossing notices the absence of the watchman, sees the train approaching by which he is subsequently hurt, and has notice of all the absent watchman could have informed him of, and voluntarily puts himself in a place of danger, he cannot charge his injuries to any omission of duty on the part of the watchman. So held in Duncan *v.* Missouri Pac. Ry. Co., 46 Mo. App. 198.

16. NEGLIGENCE AFTER DISCOVERY OF PERIL.

But, of course, the failure of those in charge of a train to exercise ordinary care to avoid a collision with another user of the crossing after the peril of the latter is discovered by them may render the company liable, notwithstanding there was contributory negligence in going on the track with knowledge that the train was approaching. Central of Georgia Ry. Co. *v.* Forshee, 125 Ala. 199, 18 Am. & Eng. R. Cas., N. S., 467; Memphis & Charleston R. Co. *v.* Martin, 117 Ala. 367, 23 So. 231.

CARROLL *v.* BOSTON ELEVATED RY.

(Supreme Judicial Court of Massachusetts. Middlesex, March 23, 1910.)

[91 N. E. Rep. 525.]

Street Railroads—Rights of Travelers on Street.*—Travelers on a street partly used by a street railroad may use that part of the street as freely as any other, subject only to the limitation that they do not unreasonably interfere with the street railway cars and exercise ordinary prudence to avoid collision with them; and those in charge of street cars are bound to drive them in view of the travelers' rights, each owing the other a reciprocal duty.

Street Railroads—Collision with Wagon—Question for Jury.—In an action for injuries to the occupant of a wagon driving on the right-hand side of a street, by a street car striking the rear of the wagon, whether plaintiff was negligent and whether the motorman was negligent held, under the evidence, for the jury.

Exceptions from Superior Court, Middlesex County; Loranus E. Hitchcock, Judge.

Action by one Carroll, as administratrix, against the Boston Elevated Railway. Verdict directed for defendant, and plaintiff brings exceptions. Exceptions sustained.

James H. Vahey and *Thomas F. Vahey,* for plaintiff.
F. W. Fosdick and *E. A. Counihan, Jr.,* for defendant.

RUGG, J. This is an action of tort to recover damages for personal injuries. There was evidence tending to show that the plaintiff's intestate, driving an ordinary democrat wagon on the right-hand side of a public way in which were tracks of the defendant, came upon a covered milk wagon going in the same direction. There was room enough for him to pass the milk wagon without driving upon the tracks of the defendant, but not without getting so near as to come within the sweep of a passing car. Before starting to pass the milk wagon, which was going at little more than a walk, he looked and saw a car coming in the same direction "quite a distance away, so that he

*For the authorities in this series on the subject of the right to drive or walk upon or cross street railway tracks at points other than street crossings, see foot-note of Baldie *v.* Tacoma, etc., Co. (Wash.), 34 R. R. R. 350, 57 Am. & Eng. R. Cas., N. S., 350; last paragraph of second foot-note of Norfolk, etc., Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets see third foot-note of preceding case.

thought there would be ample time to get by before they [the car] could come onto him." He then tried to drive by, but just as he was getting past it and out of danger the car struck his left rear wheel and he was injured.

The relative rights of travelers by street cars and horse-drawn vehicles upon public ways have been often stated. A street railway gains no exclusive or paramount right to use that portion of the highway included within its location. It has a certain important preferential right by reason of the fact that its cars can go only upon its rails and because it is designed thus to provide for the public a means of rapid transit. But other travelers can use that part of the street as freely as any other, subject only to the limitation that they do not unreasonably interfere with the street railway cars and that they exercise ordinary prudence to avoid collision with them. Those in charge of street cars are bound to drive them with a view to these well-established principles and to be reasonably careful to avoid running into other travelers upon the highway. Each kind of traveler owes a reciprocal duty to the other, and within reasonable limits may trust somewhat to the expectation that the other will perform such duty. It has been pointed out that circumstances may exist where it cannot be pronounced negligent as matter of law so to drive upon a street railway track as to require an oncoming car to abate something of its speed. Jeddrey *v.* Boston & Northern Street Railway, 198 Mass. 232, 84 N. E. 316.

The evidence in the present case would support a finding that the plaintiff's intestate looked before driving where it was possible for a car to hit him, exercised a reasonable judgment as to how far away the car was, and had almost reached the place in front of the milk wagon where he would have been outside the overhang of the car. The testimony of the motorman was that the speed of the car was eight miles an hour at the time the plaintiff's intestate said he looked, and it is undisputed that the near hind wheel of his wagon was struck, circumstances which bore materially upon the correctness of the opinion formed by him as to the likelihood of his passing without danger. The cases upon which the defendant relies, of which Holian *v.* Boston Elevated Railway, 194 Mass. 74, 80 N. E. 1, is an example, are distinguishable in that the questions there presented related to pedestrians attempting to cross tracks substantially at right angles in front of a car, generally under quite different conditions as to distance and speed of the car, their own rate of progress and the ease of avoiding and facility of escaping danger. The due care of the plaintiff's intestate was for the jury. Creavin *v.* Newton Street Railway, 176 Mass. 529, 57 N. E. 994; Coleman *v.* Lowell, Lawrence & Haverhill Street Railway, 181 Mass. 591, 64 N. E. 402; Callaghan *v.*

Boston Elevated Railway, 86 N. E. 767, and cases cited; Hatch *v.* Boston & Northern Street Railway, 91 N. E. 523.

The negligence of the defendant's motorman also should have been left to the jury. It cannot be said as matter of law that his testimony, taken in conjunction with the statement of the plaintiff's intestate, would not support a finding that he negligently failed to appreciate how near his running board was to the wheel of the wagon and that a little more circumspection on his part would have averted an accident. Wright *v.* Boston & Northern Street Railway, 203 Mass. 569, 89 N. E. 1073.

Exceptions sustained.

CATHEY *v.* SEATTLE ELECTRIC CO.

(Supreme Court of Washington, April 28, 1910.)

[108 Pac. Rep. 443.]

Street Railroads—Collision with Vehicle—Personal Injuries—Question for Jury.—In an action against a street railroad company for personal injuries, sustained in a collision between a street car and an ice wagon, under the evidence, the cause held properly submitted to the jury.

Jury—Drawing Jurors—Statutory Provisions—Absence of—Common-Law Method.—In the absence of statutory provisions, the common-law method of procuring jurors by open venire directed to the executive officer of the court may be resorted to at the present time.

Jury—Drawing Jurors—Statutory Provisions—Absence of—Common-Law Rule.—Laws 1905, c. 146, as amended by Laws 1907, c. 63, made it the duty of the superior court to appoint jury commissioners in each county in June of each year, who were to select the names of all qualified jurors in their county and deposit them in a box, and on the second Saturday of each month as many names were to be drawn as the judge might direct to serve during the ensuing month. Laws 1909, c. 73, repealing all inconsistent laws, directed superior courts to divide their counties into not less than three nor more than six jury districts, and the clerks were directed during the month of July of each year to make up a jury list containing the names of all qualified jurors of each district. From this he was from month to month to draw the jury in a similar manner as under the previous law, except that the drawing was done by the clerk without the aid of the commissioners. Const. art. 4, § 6, provides that superior courts shall always be open except on nonjudicial days. Article 1, § 21, provides that the right of trial by jury shall remain inviolate. The present trial occurred June 24, 1909. The jurors in attendance were selected the preceding month under the Laws of

1905, as amended. Laws 1909 went into effect June 8, 1909. Held, that there being no statute law in force during the month of June, 1909, the superior court was not prevented from lawfully proceeding with the trial, since the jurors were in attendance in pursuance of the lawful statutory method, no other statutory method being then in existence, and, if no jurors were present, it could have summoned an open venire as at common law.

Negligence—Imputed Negligence—Driver of Vehicle.*—In an action against a street railroad company for personal injuries in a collision between a street car and an ice wagon upon which plaintiff was employed, but which was driven by another, the negligence of the driver could not be imputed to plaintiff, in the absence of a showing that it was any part of his duty to drive the team, or that he had any supervision or control over the driver.

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by William W. Cathey against the Seattle Electric Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

James B. Howe and *Hugh A. Tait,* for appellant.
Milo A. Root, for respondent.

PARKER, J. This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from the negligent operation of one of the street cars of the defendant. The defendant operates a double track electric street railway upon First avenue in Seattle. First avenue runs approximately north and south. Battery street intersects First avenue at right angles. Bell street also intersects First avenue at right angles one block south of Battery street. The plaintiff was injured by a collision between a street car of the defendant and an ice wagon on which plaintiff was riding at a point on First avenue about halfway between Battery and Bell streets. On May 2, 1907, plaintiff and one Hans Roundstad were employed by the Standard Ice Company and were delivering ice. In the course of their duties they were proceeding north on the east side of First avenue. Roundstad was driving, being seated on the right, while plaintiff was seated on the left, both in the driver's seat. As they passed Bell street, the off horse became much frightened at a furniture van, and started to rear and jump and to

*For the authorities in this series on the subject of imputed negligence, see first foot-note of Coburn *v.* Moline, etc., Ry. Co. (Ill.), 34 R. R. R. 429, 57 Am. & Eng. R. Cas., N. S., 429; fifth head-note of Lundergan *v.* New York Cent. & H. R. R. R. (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; sixth head-note of Alabama G. S. R. Co. *v.* Hanbury (Ala.), 34 R. R. R. 321, 57 Am. & Eng. R. Cas., N. S., 321; tenth head-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65.

crowd the other horse to the left towards the car tracks. At this time one of defendant's cars was proceeding south on Second avenue on the west car track, near Battery street. There was nothing to obstruct the view between the car and the wagon, which were then approximately a block apart and approaching each other. The horses continued to rear and crowd towards and upon the car tracks, the driver trying to pull them back upon the east side of the tracks, so as to miss the approaching car; but upon the nearer approach of the car the driver, believing that it would be safer and more likely to avoid a collision with the car, pulled the horses to the left across the track on which the car was approaching hoping to miss the car by passing it on the west side of the street. The horses and the front part of the wagon passed over the track, but the car struck the right rear wheel of the wagon, throwing it over; the plaintiff falling with one of his legs under it, causing the injuries for which he claims damages. The negligence charged against the defendant is that its motorman in charge of the car "needlessly and recklessly permitted his car to run against said wagon, which he could plainly see, and which he could easily have avoided by the exercise of ordinary care and prudence." The defendant denied all negligence on its part and that of its motorman, and alleged that the injuries sustained by plaintiff were caused by his own carelessness and negligence which contributed thereto, and were the approximate cause thereof. A trial before the court and a jury resulted in a verdict in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict, and also for a new trial. These motions being denied, judgment was entered upon the verdict, and the defendant has appealed.

We will first notice appellant's contentions upon its motions for judgment and for new trial, in so far as they challenge the sufficiency of the evidence to sustain the verdict. There was evidence tending to show that the horses, by reason of their fright, especially the fright of the off horse, became uncontrollable so far as the driver being able to keep them on the east side of and off the track of the approaching car; that their frightened condition and the driver's efforts to control them and their tendency to go upon the track that the car was approaching upon could be plainly observed by a person situated as the motorman was upon the front platform of the car, from the time they were nearly a block away from the car until the collision actually occurred; that, if the car had been stopped at a very short distance north of where the collision occurred, the rear end of the wagon would have passed over the track and cleared the car without collision; that the motorman could have stopped the car sooner than he did after seeing the probability of the accident and avoided the collision, especially if he had the

car under proper control; that the driver of the horses was a strong man and an experienced driver; that he did all that an experienced driver could do to avoid the collision; and that respondent did nothing, and could do nothing, to avoid the collision. There being evidence tending to show these facts, we think the cause was properly submitted to the jury.

It is contended that the trial court erred in denying the appellant's challenge to the panel of jurors. The challenge was based upon the ground that the jurors were not selected in accordance with chapter 73, p. 131, Laws 1909, but were selected under chapter 146, p. 270, Laws 1905, as amended by chapter 63, p. 102, Laws 1907. By the Laws of 1905 and 1907 it was the duty of the superior court to appoint jury commissioners in each county in June of each year. It was the duty of these commissioners to select the names of all qualified jurors in their county and deposit their names written on separate slips of paper in a box to be delivered to and remain in the custody of the clerk of the court. On the second Saturday of each month it was the duty of the jury commissioners and the clerk to assemble in open court and draw such number of names from the box as the judge might direct for petit jurors to serve during the ensuing calendar month. This trial occurred on June 24, 1909. The jurors then in attendance upon the court had been regularly selected on the second Saturday in May, 1909, under the Laws of 1905 and 1907 as above briefly outlined. At the time of so selecting the jurors for service during the month of June that law was in force. At the session of 1909 the Legislature enacted a new law for the selection of jurors, being chapter 73, p. 131, Laws 1909. This law went into force June 8, 1909, as all laws of that session did, not having an emergency clause. By this law it is made the duty of the superior courts to divide their respective counties into not less than three nor more than six jury districts, each with equal population as near as may be. It is made the duty of the clerk of the court during the month of July in each year to make up a jury list containing the names of all qualified jurors in each district, to provide boxes for each district, write the names of the jurors upon slips of paper, and deposit the names in the boxes of the proper districts. From these boxes the jury is to be drawn from month to month in a similar manner as under the previous law, except the drawing is done by the clerk of the court without the aid of jury commissioners, and the names are to be drawn in equal numbers from each jury box. The jurors so drawn are to serve for the ensuing month.

We have, then, this situation: The jurors attending upon the court at the time of this trial were regularly selected for service for June, 1909, under a law that was in force on the second Saturday of May, the time of their selection, but was not in

force at the time of the trial because the new law of 1909 had the effect of repealing the prior laws when it went into force on June 8, 1909. State *v.* Superior Court, 104 Pac. 1131. There could be no jury list made up by the clerk of the court under the law of 1909 from which a jury could be drawn to serve during June, 1909, since the first selection of jurors under that law could not occur until July, 1909, so there was no statute law in force during the month of June, 1909, that provided any method whatever for the selection of jurors to attend upon the superior courts of the state during that month. The effect of the argument of learned counsel for appellant is that the superior courts of the state were without power to proceed with jury trials at this time because of this want of statutory law providing for the selection of jurors. The superior courts are created by the state Constitution. They possess general original jurisdiction, both in law and equity. Section 6, art. 4, of the Constitution, wherein their jurisdiction and powers are defined among other things, provides that "they shall always be open except on nonjudicial days," and by section 21, art. 1, of the Constitution, it is provided that "the right of trial by jury shall remain inviolate." Clearly the Constitution contemplates that the superior courts of the state shall at all times, except upon nonjudicial days, have power to proceed with their business, and this, of course, includes trial by jury as well as their other business. These are powers which cannot be taken away from the superior courts by anything less than a change in the Constitution, unless it can be held that the absence of a statutory method for selecting jurors has the effect of depriving the superior courts to procure jurors for the conduct of its jury business. For nearly 50 years the statute law of this state and territory has provided as follows: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." Section 143, Rem. & Bal. Code. In view of the common-law source of our jurisprudence, it is more than likely that this would be the rule of decision in this state even in the absence of such a statutory provision. The power of procuring the attendance of jurors upon courts at common law was ample for that purpose before there were any statutes regulating the matter, both in England and America; and the authorities seem to clearly support the view that, in the absence of statutory provisions, the common-law method of procuring jurors—that is, by open venire directed to the executive officer of the court—may be resorted to at the present time. 12 Enc. of Pl. & Pr. 274; 24 Cyc. 208; 3 Blackstone, 352; Clawson *v.* United States, 114 U. S. 477, 486, 5 Sup. Ct. 949, 29 L. Ed. 179; U. S. *v.* Beebe, 2 Dak. 292, 11 N. W.

505; Carter *v.* Territory, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443; Berry *v.* United States, 2 Colo. 186, 197.

In the case last cited Chief Justice Hallet, in discussing the power of the court to summon jurors in the absence of statutory provisions, at page 198, said: "It will not be claimed that the powers possessed by courts are entirely derived from the written or statute law. As is well said in a late edition of a standard work, courts did not originate in Constitutions. They were known to the common law, and their powers are there well defined. If courts possessed only such powers as are granted in Constitutions and statutes, they could not protect themselves from insult and outrage; they could not compel the attendance of witnesses, or obligations to testify when present; they could not compel the attendance of jurors, nor punish them for improper conduct. Potter's Dwarris on Statutes, 340. In our own law, not only the method of proceedings, but the remedies given to suitors, are defined almost entirely by the common law. Of late the judicial power has been regulated by statute more fully than ever before, and still very much of it rests in the common law. That authority is not conferred by statute is no evidence that it does not exist, for the common law continually supplements the statute law supporting it at every point, and providing for all its deficiencies. Of this, the law relating to juries is a good illustration, for, although the qualifications and selection of jurors are now usually regulated by statute, the process for bringing them into court is given by the common law, and their powers and duties are derived almost entirely from the same source."

We have noticed this common-law power for the purpose of showing that it exists, and conclude that the superior courts of the state were not prevented from lawfully proceeding with jury trials during the month of June, 1909, simply because there was then no statute law in force providing for the manner of selecting and summoning jurors for service during that month. It is true the jurors in attendance upon the court at the time of this trial were not summoned by common-law process, but they were then in attendance upon the court in pursuance of a lawful statutory method which was in force at the time of their selection and coming into court, and no other statutory method was then in existence by which jurors could be selected for service at that time. We are of the opinion that the court could lawfully proceed to trial with the jurors then present, or, if there had been no such jurors present, it could have summoned a sufficient number to transact the jury business of the court by open venire as at common law. Appellant's right to challenge individual jurors either peremptorily or for cause was not impaired in the least, by the manner of selecting or summoning the jury, and this record fails to show the exercise of any such challenge by appellant.

Among other things, the court instructed the jury as follows: "A person riding in a wagon with another person who is driving a team which is hauling said wagon is not responsible for the negligence of such driver in a case of this kind, unless he caused said driver to be negligent, and unless plaintiff's negligence concurs with the negligence of the driver. In this case, if you believe that the driver of the ice wagon was negligent, but that plaintiff did not cause such negligence and was not responsible therefor and was not guilty of negligence on his part, then it would be no defense to plaintiff's right to recover against defendant." This instruction is claimed to be erroneous and prejudicial to appellant, in that it is too general and ignores the relation existing between respondent and the driver. It is argued by counsel for appellant that the negligence of the driver, if any, should be imputed to the respondent by reason of their relation at the time of the accident. There was no evidence tending to show that it was any part of respondent's duty to drive the team, or that he had any supervision or control over the driver. This being true, we think the instruction was not erroneous as applied to the facts of this case. In the case of Shearer *v.* Town of Buckley, 31 Wash. 370, 378, 72 Pac. 76, an instruction was approved by this court upon the same principle which we think will sustain this instruction. The only difference between that case and this is that the injured person in that case was riding in a wagon as the guest or companion of the driver of the horses, but as in this case he had no authority or control over the person driving, or the team, and that fact appears to be the principle reason assigned by the court for exempting the injured person from the effect of the negligence of the driver. In addition to the cases there cited, the case of McBribe *v.* Des Moines City Ry. Co. (Iowa) 109 N. W. 618, and cases therein cited lends support to this view.

Other errors are assigned upon the rulings of the court in connection with the examination of witnesses. These we have examined and regard them all without merit. They all relate to matters within the discretion of the trial court. They are not such that we feel called upon to discuss them in detail.

We find no prejudicial error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., and CROW, DUNBAR, and MOUNT, JJ., concur.

INTERSTATE COMMERCE COMMISSION, Appt., *v.* NORTHERN PACIFIC RAILWAY COMPANY.

(Argued February 23 and 24, 1910. Decided March 7, 1910.)

[30 Sup. Ct. Rep. 417.]

Commerce—Interstate Commerce Commission—Review of Decision—Existence of Satisfactory Through Route.*—The courts may review the determination of the Interstate Commerce Commission upon the question whether "no reasonable or satisfactory through route exists" within the meaning of the act of June 29, 1906 (34 Stat. at L. 589, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1158), § 4, conditioning the authority of the Commission to establish through routes and joint rates upon the nonexistence of such route.

Carriers—Interstate Commerce Commission—Powers—Establishing Through Routes and Joint Rates.—The personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route via the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the Interstate Commerce Commission in the exercise of its power under the act of June 29, 1906, § 4, to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through rates and joint rates between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.

Appeal from the Circuit Court of the United States for the District of Minnesota to review a decree enjoining the enforcement of an order of the Interstate Commerce Commission, establishing through routes and joint rates between eastern points and points on the Northern Pacific Railway between Portland and Seattle via the Union Pacific Railway. Affirmed.

The facts are stated in the opinion.

Assistant to the *Attorney General Ellis* and *Messrs. P. J. Farrel* and *Edwin P. Grosvenor* for appellant.

Mr. Charles W. Bunn for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to restrain the enforcement of an order of the Interstate Commerce Commission. 16 Inters. Com. Rep. 300.

*For the authorities in this series on the question whether the acts of railroad commissions are subject to judicial review, see second head-note of State *v.* Atlantic Coast Line R. Co. (Fla.), 15 R. R. R. 286, 38 Am. & Eng. R. Cas., N. S., 286.

A preliminary injunction was granted by four circuit judges, on the ground that the Commission had exceeded its powers, and the case was brought here by appeal. The order was made in a proceeding instituted by the Commission upon its own motion, and required the establishment of through routes and joint rates for passengers and their baggage, east and west, from and to points on the Chicago & Northwestern Railway between Chicago and Council Bluffs, Iowa, inclusive; and from and to points on the Union Pacific Railroad between Colorado common points and Omaha, Nebraska, and Kansas City, Missouri, inclusive; via Portland, Oregon; to and from points on the Northern Pacific Railway between Portland and Seattle. The joint rates are to be the same as the present rates between the same points via the Northern Pacific road and its connections. This order concerns passenger travel in one direction only. It does not affect round trips, and it does not deal with freight.

The points between Portland and Seattle can be reached from the places mentioned at the other end of the route, by way of the Northern Pacific alone from St. Paul, or by way of the Chicago, Burlington, & Quincy to Billings, Montana, and then by the Northern Pacific for the last thousand miles; the Chicago, Burlington, & Quincy being jointly owned and controlled by the Northern Pacific and the Great Northern roads. But an average of 8,000 persons a year go by way of the Union Pacific to Portland, where, to go further, passengers have to change to the Northern Pacific line. Under present arrangements, the Union Pacific issues a coupon with its tickets, entitling the holder to a first-class passage on from Portland, but he has to exchange the coupon for a ticket, to recheck his baggage, and to pay the additional Pullman fare. The effect of the order is to put the Union Pacific on an equal footing with the Northern Pacific in the use, for through travel, of the road belonging to the latter between Portland and Seattle. It is said that this road, with the expensive terminals of the Northern Pacific at Tacoma and Seattle, would not be supported by local business, but depends on the traffic of the whole Northern Pacific system. Therefore, the Northern Pacific objects to the order and brings this bill.

The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that "no reasonable or satisfactory through route exists." Act of June 29, 1906, chap. 3591, § 4. 34 Stat. at L. 589, U. S. Comp. Stat. Supp. 1909, p. 1158. It is urged that this condition is addressed only to the opinion of the Commission, and cannot be re-examined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply im-

posing a rule of decision, and often will be read in that way when dealing with a court of general powers. Fauntleroy v. Lum, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641. But even is such a case there may be a difference of opinion (id. 245), and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. See Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, ante, 155, 30 Sup. Ct. Rep. 155.

We are of opinion, then, that the Commission had no power to make the order if a reasonable and satisfactory through route already existed and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt, in complex and delicate cases great weight, at least, would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass. It is admitted that the Northern Pacific route is shorter than that of the Union Pacific by way of Portland, and the running time somewhat less; and it is added by the majority that the "passenger goes in as good a car and is provided with as good a berth and as good a meal."

There is some suggestion that at times the northern route may not be as good as the southern, although at other times it may be better; but the ground of the order avowedly was that the personal preferences of many travelers is to go by the southern way. If they do, it is said, they can select from a great variety of routes as far as Ogden, Utah; they can visit cities not reached by the northern lines; they can search over a wide area for homesteads; they can behold the natural beauties that may be rivaled but not repeated on the other roads. It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that "no reasonable or satisfactory through route exists." Obviously, that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implies, the injustice pointed out by the chairman in his dissent is not permitted by the law.

Decree affirmed.

BURLINGTON LUMBER CO. *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, March 2, 1910.)

[67 S. E. Rep. 167.]

Trial—Failure to Give Instructions.—The failure to give a requested instruction is not error where the question is substantially covered by the general instruction.

Carriers—Penalties for Refusal to Receive Freight—Action to Recover—Burden of Proof.—In an action against a carrier for the penalty for failure to receive and transport an interstate shipment, plaintiff does not have to show that defendant has filed and published its schedule of freight rates as required by law, defendant being presumed to have complied with the law.

Carriers—Failure to Receive Freight—Action for Penalties—Defenses.—It being the duty of a carrier of interstate commerce to file and publish its schedule rates, its failure to do so is no defense to an action for the penalty for refusing to receive for transportation an interstate shipment.

Commerce—Statutory Regulation—Penalty for Refusal to Receive Shipment.—Revisal 1905, § 2631, imposing a penalty on carriers for refusal to accept shipments of freight, is not invalid as applying to interstate commerce, as the penalty is incurred by the violation of a common-law duty to accept freight whenever tendered, which is an act done entirely within the state and no part of the act of transportation.

Trial—Refusing Instructions.—The refusal of an instruction based on a theory not supported by the evidence is not error.

Carriers—Refusal to Receive Freight—Action for Penalty—Who May Sue.—The shipper is the party aggrieved by a carrier's wrongful refusal to accept a shipment of freight, and he is entitled to sue for the penalty prescribed by Revisal 1905, § 2631.

Carriers—Regulation—Refusal to Receive Freight.—Under Revisal 1905, § 2631, imposing a penalty on carriers for refusal to receive freight for shipment, a carrier is liable where freight for shipment to another state was tendered, and because the agent did not have the schedule of freight rates to the point of destination he refused for over two months to issue a bill of lading of any sort even to the end of its line or to deliver to a connecting carrier.

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Alamance County; Long, Judge.

Action by the Burlington Lumber Company against the Southern Railway Company. Plaintiff had judgment, and defendant appeals. Affirmed.

The plaintiff sought to recover the penalty prescribed by Revisal 1905, § 2631, for the refusal of the defendant to receive

for shipment to Saginaw, Mich., certain milling machinery tendered it by the plaintiff on January 28, 1907, no bill of lading for said machinery being issued until April 3, 1907. The plaintiff's contention was that the defendant failed and refused to receive said machinery for shipment upon tenders made daily and continuously for a period of 65 days, and that by reason of said refusal said defendant became indebted to the plaintiff in the sum of $3,050, all of this amount in excess of $2,000 being remitted by the plaintiff. The defendant denied that there was any tender of machinery for shipment until April 3, 1907, the day on which bill of lading was issued. It alleged that Revisal 1905, § 2631, was unconstitutional, in so far as it affected interstate shipments. It also alleged that the plaintiff had no such interest in the said machinery as entitled it to bring this action. There was a verdict for the plaintiff and a judgment in accordance therewith from which defendant appealed.

W. B. Rodman and *Parker & Parker,* for appellant.
W. H. Carroll, for appellee.

CLARK, C. J. The exceptions 1, 2, and 12 are for failure to give certain prayers for instruction. On examination we find they were given substantially in the charge, which is sufficient. Harris *v.* R. R., 132 N. C. 163, 43 S. E. 589; R. R. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898.

Exceptions 4, 5, 6, and 7 are for refusal to give defendant's prayers for instructions 3, 4, 6, and 7, which are, in substance that this being an interstate shipment the defendant was required to establish, file, and punish its rate between Burlington, N. C., and Saginaw, Mich., before shipping this freight, and that the burden was on the plaintiff to show that the rate had been so filed. The duty to file such rate was on the defendant, the fact was in its peculiar knowledge, and its failure to show that it had discharged such duty cannot absolve it from its duty to the plaintiff to accept and ship his freight. It cannot plead its own default as a defense to another default. Indeed, on April 3d, the agent at Burlington did get such rate from division headquarters at Greensboro, 21 miles away. There is no evidence that such rate could not have been procured at any time prior thereto.

The court committed no error in refusing these prayers for instruction. The proper establishing publication and filing rates will be conclusively presumed. In Reid *v.* R. R., 150 N. C. 764, 64 S. E. 879, the court in passing upon the same contention said: "The presumption is that the company has complied with the law, and if it were otherwise we are of the opinion that the act of Congress and the orders of the Commission made thereunder, requiring the publication of rates, was made for an entirely different purpose from that involved in this inquiry, and

does not constitute such interfering action." To same purport R. R. *v.* Oil Mill, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562. In Harrill *v.* Railroad, 144 N. C. 540, 57 S. E. 385, the court says: "It must be presumed against the contention of the defendant that it has complied with the law by filing its schedule of rates, fares, and charges with the Commission, and by publishing the same." The federal statute does not prohibit the receipt or forwarding of a single shipment, but forbids the carrier to "engage or participate in the transportation of passengers or property" interstate without filing its rates. It it the business of a common carrier, which the defendant is forbidden to exercise without filing its rates, and the statute has no sort of application to this case where the defendant was carrying on such business and presumptively, at least, under authority of law.

Exceptions 6, 13, 14, and 16 call in question the constitutionality of Revisal 1905, § 2631, as applied to interstate shipments. We have repeatedly passed upon this contention. The defendant's brief admits this, and cites eight decisions of this court which it asks us to overrule. In one of the latest of these —Reid *v.* R. R., 149 N. C. 423, 63 S. E. 112—the authorities were reviewed, and the court said: "The defendant contends, however, that Revisal 1905, § 2631, giving a penalty for refusing to accept freight for shipment, is unconstitutional when the freight is to be shipped into another state, but refusing to receive for shipment is an act wholly done within this state; it is not a part of the act of transportation, and our penalty statute applies. This was held by Avery, J., in Bagg *v.* Railroad, 109 N. C. 27 [14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569], where the railroad company received the shipment for a point in another state, but negligently detained it for five days before shipping. The precise point herein was raised in Currie *v.* Railroad, 135 N. C. 536 [47 S. E. 654], and it was held that this section, giving a penalty for failing and refusing to accept for shipment the car load of lumber, was not unconstitutional as an interference with interstate commerce when the lumber was offered for shipment to a point in another state. Both of these cases were cited and reaffirmed by Walker, J., in Walker *v.* Railroad, 137 N. C., at page 168 [49 S. E. 84]. In Twitty *v.* Railroad [141 N. C. 355, 53 S. E. 957] it was held (Brown, J.) that where the agent held the freight in storage, but refused to give a bill of lading because he did not know the freight rates, this was 'a refusal to receive for transportation, and the railroad company was liable for a penalty under Revisal [1905] § 2631.' In Harrill *v.* Railroad, 144 N. C. 532 [57 S. E. 383] (Walker, J.,), it was held that Revisal [1905] § 2633, imposing a penalty for failure to deliver freight was valid, though the freight was interstate. There the penalty was incurred after the transportation had ceased. Here the penalty occurred before

the transportation had begun and before the freight was even received and accepted for transportation." When the case was again before the court (Reid *v.* R. R., 150 N. C. 764, 64 S. E. 878), Justice Hoke, after reviewing and approving the former decision, said: "Since this decision of the Morris-Scarboro Moffit Company *v.* Express Company [146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983] was rendered, the Supreme Court of the United States, the final authority on these matters, has held, on a question relevant to this inquiry that 'Notwithstanding the creation of Interstate Commerce Commission, and the delegation to it by Congress of the control of certain matters, the state may, in the absence of express action by Congress or by such commission, regulate, for the benefit of its citizens, local matters indirectly affecting interstate commerce.' This principle was announced and sustained in Railroad *v.* Flour Mill, 211 U. S. 612 [29 Sup. Ct. 214, 53 L. Ed. 352], a case which involved the right of the court to compel the railroad company or common carrier to place cars on a siding which had been prepared for the purpose, and for the benefit and convenience of a flouring mill engaged in making shipments of interstate commerce." The above decisions have been since followed by Connor, J. (Garrison *v.* Southern Ry. Co., 150 N. C. 575, 592, 64 S. E. 578), with full review of the authorities, and no dissent. In fact, the duty to receive freight "whenever tendered" was a common-law duty. Alsop *v.* Express Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271, cited and approved in Garrison *v.* R. R., *supra*, at page 582 of 150 N. C., at page 581 of 64 S. E. That the interstate commerce did not begin till the goods were accepted for shipment and bill of lading issued is held in Match Co. *v.* Ontonagon, 188 U. S. 94, 23 Sup. Ct. 266, 47 L. Ed. 394, citing Coe *v.* Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, where Bradley, J., held that "not till goods have begun to be transported from one state to another do they become the subjects of interstate commerce, and as such subject to federal regulation." In this opinion (page 528 of 116 U. S., page 479 of 6 Sup. Ct. [29 L. Ed. 715]) he says: "It is true it was said in the case of The Daniel Ball, 10 Wall. 565 [19 L. Ed. 999]: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. * * * Until shipped or started on its final journey out of the state, its exportation is a matter altogether in fieri, and not at all a fixed and certain thing." Besides, the statutory enforcement, under penalty, of the common-law duty to accept freight "whenever tendered" is not in the scope of terms of any act of Congress,

and is neither an interference with nor a burden upon interstate commerce, but in aid of it

Exceptions 9, 10, and 11 are for refusal of prayers based on the theory that the goods were accepted for shipment January 28, 1907, which is not supported by evidence, and were properly refused. Hassard-Short *v.* Hardison, 117 N. C. 60, 23 S. E. 96.

Exceptions 17, 18, 19, 20, 21, 22, and 23 present only one question, and may therefore be treated together. Did the plaintiff have the right to bring this action? Was he the aggrieved party? The law is correctly set forth in the following citations: "The shipper of the goods is the party aggrieved, and is the one entitled to sue for the penalty prescribed in Revisal 1905, § 2631, which arises from the wrongful refusal of the carrier's agent to accept them for transportation." Reid *v.* Railroad, 149 N. C. 423, 63 S. E. 112; s. c. 150 N. C. 753, 64 S. E. 874. "In giving the penalty to the party aggrieved the statute simply designates the person who has the right to demand that the service be rendered. The party aggrieved in statutes of this character is the one whose legal right is denied, and the penalty is enforceable independent of pecuniary injury." Rollins *v.* R. R., 146 N. C. 156, 59 S. E. 671; Cardwell *v.* R. R., 146 N. C. 218, 59 S. E. 673; Summers *v.* R. R., 138 N. C. 295, 50 S. E. 714. This machinery had been shipped to the plaintiff on approval, and, as it proved unsatisfactory, it was the plaintiff's duty, if it would relieve itself of liability, to return it to the vendors at Saginaw, Mich., and it had the legal right to demand of the defendant its transportation to that point, and was the party aggrieved by failure to do so. At the last term, Connor, J., speaking for a unanimous court, said in Garrison *v.* Railroad, 150 N. C. 586, 64 S. E. 583: "The defendant next urges that the penalty of $50 for each day the said company refuses to receive said shipment can be recovered only when a tender is made on each day. We cannot concur in that view. The plaintiff hauled his lumber to the defendant's regular depot, and with his consent placed it upon the car (in this case, in its depot) demanding a bill of lading, which was refused. Plaintiff says he went to the agent two or three times and asked if he had shipped it and he said he had not. * * * To require the defendant to haul the lumber home and return it to the depot each day, or to go through the empty form of making a constructive tender, inposes either an unwarranted hardship or savors of trifling with a man's substantial rights. The plaintiff left the lumber on the car with a standing tender and demand that it be shipped. * * * The statute would be of little value as a remedy for an existing evil if the narrow construction is given as contended by defendant. The Legislature evidently intended to impose a penalty for each day

upon which the freight was at the depot ready for shipment. * * * Each day's delay in shipping was 'a refusal to ship' within the meaning of the statute." The verdict of the jury established that the defendant failed and refused for 61 days to receive said goods for shipment. The plaintiff remitted all in excess of the penalty for 40 days.

If the defendant had offered to ship to end of its line, and declined to ship further for lack of rates, a different point might have been presented, but there is no such exception in the record or in appellant's brief, and more than one of defendant's prayers is predicated on its refusal to issue any bill of lading because the agent at Burlington did not have the rates to Saginaw though he had applied to the agent at Greensboro for them. But the neglect of the agent at Greensboro, or of those "higher up," was the failure and default of the defendant. Besides, if the defendant had issued the bill of lading, it is common knowledge that it would have contained the words "said company agrees to carry to its usual place of delivery, if on its road, otherwise to deliver to another carrier on the route to said destination." These words, always used in such cases, are retained in the bill of lading prescribed by the Interstate Commerce Commission. The plaintiff asked for no other kind of bill of lading and could not have expected the defendant to be responsible for shipment beyond the end of its own line. The defendant refused to issue any bill of lading at all (which would have been, of course, in the usual form for such shipments) or to ship at all, and the defendant is liable. Twitty *v.* R. R., 141 N. C. 355, 53 S. E. 957, in which the opinion by Brown, J., is exactly in point.

Affirmed.

ASHLEY *v.* CENTRAL OF GEORGIA RY. CO.

(Court of Appeals of Georgia, May 12, 1910.)

[68 S. E. Rep. 56.]

Carriers—Freight Delivered on Right of Way—Liability of Carrier—Loss by Fire.*—Relatively to property for carriage, railroad companies owe no duty of diligence under the law, except where the property has been delivered at stations or places designated by the company for its delivery. Where property is placed on the railroad right of way by request of the owner and solely for his convenience, and permission is given by the railroad company to place it there, by virtue of a contract in which the owner, in consideration of such permission, relieves the railroad company from any and all liability "for the loss, damage, or destruction of said property while on its right of way, whether such loss, damage, or destruction be attributable to the negligence of any agent or employee of the company, or from any cause whatever," the contract is valid; and, if the property is destroyed by fire while on the right of way, the company cannot be held liable, except for gross negligence or willful misconduct. Holly *v.* Southern Ry. Co., 119 Ga. 767, 47 S. E. 188; 3 Elliott on Railroads (2d Ed.) § 1236; Evans *v.* Nail, 1 Ga. App. 42, 57 S. E. 1020. (Russell, J., dissenting.)

Loss by Fire—Evidence.—Irrespective of the contract above mentioned, the evidence in this case did not clearly show that the property was burned by the negligence of the railroad company. If there was any inference fairly deducible from the evidence sufficient to raise the statutory presumption of negligence, it was fully rebutted by the evidence in behalf of the defendant. The destruction of the property seems to have been a casualty necessarily incident to its location in close proximity to passing engines.

Review on Appeal.—No material error of law was committed, and the verdict is right under the law and the evidence.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by L. A. Ashley against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Austin Branch, for plaintiff in error.
J. C. C. Black, for defendant in error.

HILL, C. J. Judgment affirmed.

*For the authorities in this series on the question, when does a railroad's liability as a common carrier of freight begin, see last foot-note of Lord *v.* Maine Cent. R. Co. (Me.), 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130; second head-note of St. Louis, etc., Ry. Co. *v.* Burrow & Co. (Ark.), 33 R. R. R. 754, 56 Am. & Eng. R. Cas., N. S., 754.

SANTA FE, P. & P. RY. CO. *v.* GRANT BROS. CONST. CO.

(Supreme Court of Arizona, April 2, 1910.)

[108 Pac. Rep. 467.]

Carriers—"Private Carriers."—A common carrier may become a "private carrier," when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry.

Carriers—Common or Private Carrier—Tests—"Common Carrier."*—The tests whether a carrier is a "common carrier" are: First, he must be engaged in the business of carrying goods for others as a public employee, and so hold himself out; second, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms.

Carriers—Special Contracts—Contractors—Construction—"Point."—Under a contract providing that a carrier would return the outfit of a railroad contractor to point of shipment from any point on the carrier's line, the word "point" would be construed to mean a station or point where the carrier was doing its regular business as a common carrier.

Carriers—Private Carriers—Contractor's Outfit—Destruction of Goods.—Under a contract providing that a carrier would return the outfit of a railroad contractor to point of shipment from any point on the carrier's line, where a loss occurred at a place which was between two regular stations on the carrier's line, the carrier could not escape liability on the theory that he was a private carrier, in that the outfit had been picked up at a place which was beyond any station of the carrier, where, after the goods arrived at a station, they were billed through to point of destination, as any other goods, though at the contract rate.

Carriers—Private Carriers—Carriage of Contractor's Outfit—Reduced Rates.—Where a common carrier agrees with a contractor for an extension to carry at a reduced rate to and from the place of construction the necessary grading outfit, supplies, etc., loss to be at contractor's risk, and the goods which were actually carried were the goods commonly carried by it and for which it had a tariff rate, and the movement of the train on which the goods were was directed like other trains, it is a common carrier as to such goods, and not a private carrier, and hence is liable for destruction of the goods caused by its negligence.

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas. N. S., 176.

Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co

Carriers—Limitation of Liability.†—A common carrier may, by an agreement to that effect, based on proper consideration, limit its liability for loss of or damage to goods of a shipper, except such as may be caused by its own negligence.

Carriers—Loss of Goods—Burden of Proof.‡—In an action for loss by fire of goods in transportation, loss to be at shipper's risk, the burden is on the shipper to show that the fire was caused by the negligence of the carrier.

Trial—Question for Jury—Undisputed Evidence.—Where evidence, though undisputed, might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence, it is for the jury.

Carriers—Loss of Goods—Question for Jury.—In an action for destruction of goods by fire, whether the carrier was negligent in leaving the shipment at an out of the way station, where there was neither station agent, nor water, no inhabitants, and no one to look after the safety of the cars containing it, held for the jury.

Carriers—Rates—Interstate Commerce—Railroad Contractors.—Where an agreement for a reduced rate for the shipment of a railroad contractor's outfit is included in the specifications and contract, under which a contractor was the successful bidder, his action for damages for loss of goods shipped cannot be defeated because he was given a preference in rates under the interstate commerce law, since such right was expressly recognized by the commerce commission in an administrative ruling.

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by Grant Brothers Construction Company against the Santa Fe, Prescott & Phœnix Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Paul Burks, A. H. Van Cott, and *L. H. Chalmers,* for appellant.

A. C. Baker and *Isadore B. Dockweiler,* for appellee.

DOAN, J. This is an appeal from a judgment for $9,061, ren-

†For the authorities in this series on the question whether a common carrier of freight may limit its liability, see second foot-note of Summerlin *v.* Seaboard Air Line Ry. (Fla.), 31 R. R. R. 657, 54 Am. & Eng. R. Cas., N. S., 657.

For the authorities in this series on the question whether a common carrier of freight can exempt itself by contract from liability for its own negligence or that of its employees, see first foot-note of McIntosh *v.* Oregon R. & N. Co. (Idaho), 33 R. R. R. 768, 56 Am. & Eng. R. Cas., N. S., 768; first foot-note of Wisecarver & Stone *v.* Chicago, etc., Ry. Co. (Iowa), 33 R. R. R. 728, 56 Am. & Eng. R. Cas., N. S., 728.

‡See second foot-note of Joliffe *v.* Northern Pac. R. Co. (Wash.), 32 R. R. R. 228, 55 Am. & Eng. R. Cas., N. S., 228.

dered by the district court of Maricopa county as damages for the loss by fire of the property of the appellee while in transit on the road of the appellant company.

The facts in the case appear to be that prior to June 5, 1907, the construction company had been engaged in grading a railroad for the appellant. The contract under which this road was constructed (composed of 18 subheads or paragraphs) contained, among other conditions and provisions, the following, to wit: "(14) Water will be delivered in cars at the end of the track at the rate of one dollar and fifty cents ($1.50) per 1,000 gallons, and supplies will be hauled to end of track, both in the usual manner of construction trains, subject to delays, etc., incident thereto. All risk of loss or damage to be borne by the contractor. (15) The company will furnish a rate of one cent per ton mile from all points on the Sante Fe, Prescott & Phœnix Road, and leased roads to the contractor on camp and grading outfit and suplies, etc., except explosives and commissary goods, and return to original shipping point at same rate on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage. (16) The company will also furnish the contractor's employees * * * a rate of one cent per passenger mile * * * and return those who have worked until completion of contract at the same rate. Passengers carried at less than tariff rates will be required to assume all risk of accidents to person and baggage. The plan of movement of these employees and freight is to be according to the rule of the general freight and passenger agent." This contract was based upon a proposal for bids made by the appellant under which the appellee was the accepted bidder. The proposal contained the stipulations as they appear in the above quotation from the contract. On June 5, 1907, upon the completion of the construction of the roadbed, the appellants, at the request of the appellee, placed certain cars at the end of the track some 12 miles west of Bouse (the last regular station west on the Arizona & Colorado Road), and appellee loaded thereon its camp and grading outfit, and several of its workmen, and the cars were hauled by appellant to Bouse. The appellee unloaded a quantity of powder and hay, and purchased transportation for the workmen. The said cars and contents were waybilled to Phœnix, Ariz., and the cars were then and there cut into and became a part of appellant's regular freight train No. 12. Appellant's freight train No. 12 then proceeded from Bouse towards Phœnix, via Wickenburg. About 11 o'clock on the night of June 5, 1907, at a point between Bouse and Wickenburg known as the A. & C. Junction, the conductor in charge of train No. 12 cut out therefrom ten cars, and left them upon a side track. Six of these cars were loaded with the outfit of the appellee, one was a commercial car of ore, and three were empty cars. Train No. 12 then proceeded

to Wickenburg with its remaining cars. These consisted of a combination or caboose car, two cars of live stock, being part of the shipment of appellee, and one empty car. On the morning of June 6, 1907, four of the cars loaded with the grading outfit and other property of the appellee that had been left upon the side track were, with their contents, destroyed by fire. There was no station agent of the appellant at the side track at the A. & C. Junction where the fire occurred; no water tank, nor any water supply there; no inhabitants there; and no one was left in charge to look after the cars thus sidetracked by the appellant. The appellee brought suit in the district court of Maricopa county to recover for the loss of that portion of the camping outfit, and other property that was destroyed by the burning of the cars and their contents. The case was tried to a jury, and a verdict returned for $9,061 damages, and judgment rendered thereon. A motion for a new trial was denied. From the judgment and the denial of the motion for a new trial, this appeal has been taken.

The appellant, in support of its various assignments of error, has presented and urged five legal propositions: "(1) That the contract for the movement of appellee's goods, in connection with the construction by it of appellant's road, was valid, and it relieved appellant from liability for the loss of appellee's goods, no matter how caused." Appellant contends that, in handling appellee's goods under the contract, it acted as a private carrier, and, if so, would have a right to protect itself by the exemption contained in the contract from liability, even if occasioned by its own negligence. This was the theory upon which the appellant tried the case in the lower court, while the theory on which the case was tried by the appellee was that the appellant acted as a common carrier, and would therefore, even under the terms of the contract, be liable for loss occasioned by its negligence.

It is conceded that a public carrier may, under some circumstances, act as a private carrier. A common carrier may become a private carrier when "as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry." Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; L. N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. 4 Elliott on Railroads, p. 11, states the rule: "Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

Mr. Hutchinson, in his excellent work on Carriers, submits (1 Hutchinson, § 48), as a test by which we can determine whether a party assumes the duties and responsibilities of a com-

mon carrier, five characteristics: "(1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire. (5) An action must lie against him if he refuses, without sufficient reason, to carry such goods for those who are willing to comply with his terms."

Applying these tests to the appellant in the case at bar, we find that:

(1) It is engaged in the business of carrying goods for others as a public employment.

(2) It undertakes, as a business, to carry goods of the kind now under consideration. The appellant's witnesses testified that the rate charged the appellee in the contract is less than tariff rates; that one cent per ton mile was less than the established rate charged to the public. It was conceded that it had a rate for the carrying of this particular kind of goods, and that it held itself out as a common carrier thereof.

(3) The appellant agreed to carry by its usual methods and over its established road the property, goods, and commodities in question. The contract provides that: "The company will furnish a rate of one cent per ton mile from all points on the Sante Fe, Prescott & Phœnix road, and leased roads for contractors on camp and grading outfit and supplies, etc., except explosives and commissary goods, and return to original shipping point at same rates on completion of the work. All movements of goods at less than tariff rates to be at consignee's risk of loss and damage." It has been urged, in this connection, that the cars were spotted by appellant, loaded by the appellee, and afterwards picked up by the appellant at the end of the track several miles west of Bouse, its last regular station, and that they were brought to Bouse for appellee's accommodation, and that such service could not have been compelled by the appellee. It is not necessary to determine the relation that existed between the parties, or where would have rested the liability for loss if any had occurred while the cars and goods were being brought from the end of the track to the station. The contract on which the appellant relies in his instance does not provide for picking up the cars at the front, but only for returning to original shipping point on completion of work from all points on the Santa Fe, Prescott & Phœnix Railway or leased roads. The word "points" would, by a fair construction, mean station or point where appellant was doing its regular business as a common carrier. The acts made obligatory on the appellee by the

contract are to be considered in this connection, rather than acts that may have been voluntarily performed by it. The test we are applying says: "When it undertakes to do," etc. The provision in paragraph 14 for hauling water and supplies to the end of track during construction does not provide for hauling camp and grading outfits, either to or from the end of the track, but seems to be a provision for hauling water and supplies during the course of construction, while the shipment of the camp and grading outfit after completion of the work appears to have been had under the provisions contained in paragraphs 15 and 16 of the contract. It would not be material whether the appellee had brought in its camp and grading outfit to the station at Bouse, and there shipped it to the point from which it had been shipped in at commencement of work, or whether, the cars being furnished at the front, the appellant had picked up these cars for it, and brought them into Bouse. Neither is it material whether in so doing the appellant acted as a private or common carrier; whether it was done for hire or gratis. The fact is established that at Bouse, a point on the railroad operated by the appellant, the camp and grading outfit was received. One provision of the contract excepts explosives and commissary goods. The record discloses that, on arriving at Bouse, the party in charge of the outfit unloaded some powder and hay; purchased transportation from Bouse to Phœnix for the employees at the rate provided by the contract; the cars were waybilled by appellant's agent (presumably at the rate of one cent per ton mile) and cut into and became a part of appellant's regular freight train No. 12, the plan of movement of which was admittedly according to the rules of the general freight and passenger agent of the appellant company.

(4) The tranportation must be for hire. This point is conceded as definitely established by the facts, as well as by the wording of the agreement.

(5) An action must lie upon a carrier's refusal, without sufficient reason, to carry such goods, if the party is willing to comply with its terms. When the freight and passengers in question were tendered to appellant at Bouse, from which point we have just stated the goods were waybilled by its agent, and transportation for the passengers was purchased from its agent, although at the reduced rates provided in the contract, there is no question but that a duty rested upon the appellant to transport the goods and employees at the rate named in the contract, and an action would lie for its refusal to do so.

The appellant, under the above rule, was a common carrier, and was, as such, transporting the goods at the time they were sidetracked at the point where they were afterwards destroyed by fire. It is conceded that a common carrier may, by an agreement to that effect, based upon proper consideration, limit its

liability for loss of or damage to goods of a shipper, except such as may be caused by its own negligence. Adams Exp. Co. *v.* Carnahan, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279. "When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character." Liverpool, etc., St. Co. *v.* Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Railroad Co. *v.* Lockwood, 17 Wall. 376, 21 L. Ed. 627; Mears *v.* N. Y., N. H. & H. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192; Richmond *v.* Southern Pacific, 41 Or. 54, 67 Pac. 947, 57 L. R. A. 616, 93 Am. St. Rep. 694. The foregoing principle is so well established by weight of authority that it is considered elementary in the law of carriers. Under this rule, the limitations in the contract will protect the appellant against liability for any loss or damage, except that caused by its own negligence.

This leaves us to consider whether the loss in this instance was caused by the negligence of the appellant. The second proposition urged by the appellant is that, "assuming for the sake of argument that the contract did not in law relieve the appellant from liability for the loss of the goods caused by its negligence, yet the burden was upon the appellee to show by a preponderance of evidence that some negligence of appellant was the proximate cause for the loss of the goods. This burden appellee totally failed to carry." It is conceded that the burden was upon the appellee to prove by a preponderance of the evidence that the loss was occasioned by the negligence of the appellant, and the court instructed the jury to that effect. Appellant states that the appellee totally failed to carry this burden. The question as to whether or not the appellee met this requirement was a question of fact for the jury. The learned court carefully instructed the jury on this point as follows: "The vital question in this case is to determine whether these goods were lost or destroyed by reason of the neglect of the railroad company. Because if they were not, Grant Bros. have to stand the loss. If they were lost through the railroad company's negligence, then the railroad company must stand it. Now the question of whether the goods were lost through the railroad company's negligence or not is one of fact for you to determine, and the burden of proving it is upon the Grant Bros. Construction Company, the plaintiff in this case. They must satisfy you by a preponderance of the evidence that this loss of these goods was brought about by negligence of the railroad company; if you are satisfied by a preponderance of the evidence that the

loss was caused by negligence of the railroad company, then you ought to award the damages for the value of the goods; if you are not so satisfied by a preponderance of the evidence that the loss was caused by the negligence of the railroad company, then you should not award any damages at all, and you should in that event find for the defendant." The court likewise defined "negligence" at considerable length, and then states: "The jury in this case, taking this as a definition of negligence, is to find from the facts surrounding the transaction in question whether or not the defendant company has committed negligence, and, if they so find, and further find that such negligence was the proximate cause of the destruction of plaintiff's property by fire, then the verdict shall be for plaintiff."

The facts in the case are undisputed. There is no conflict in the testimony in regard to the facts and circumstances surrounding the shipment of the goods from Bouse, and the setting out on the side track at the A. & C. Junction, of the cars and contents that were afterwards destroyed by fire; but the effect of these circumstances and facts in establishing negligence on the part of the appellant might be differently construed and considered by different conscientious intelligent men in determining the ultimate fact of negligence. For that reason, a submission of the question to the jury by the trial court was eminently proper, and for that reason it cannot be said that the appellee failed to carry the burden of proof. The determination of this question disposes of the next proposition urged by the appellant, that the court erred in denying the appellant's motion for a directed verdict.

The fourth proposition urged is the error of the court in instructing the jury. An examination of the court's charge to the jury discloses no reversible error.

The last proposition urged is the error of the court in denying the motion to set aside the verdict and grant a new trial. In support of this no argument is offered, and it may be disposed of by saying that if the question of negligence was one of fact for the jury, and there was evidence in the record to sustain their verdict, the denial by the trial court of the motion to set aside the same was fully sustained by the record.

The appellant, although it based its first legal proposition upon the statement that "the contract for the movement or supplies and goods in connection with the construcion of appellant's road was valid," has in the latter part of its brief urged that such contract would, by offering a different rate than that offered to the public generally, be invalid by reason of coming within the inhibition of the interstate commerce law. In reply to this, it may be said that this was not a private contract to Grant Bros. as a corporation, but was included in the appellant's proposal for bids, the benefit of which would accrue to any one who would be

the successful bidder. The right, however, of a railroad, as a common carrier, to grant such terms, was recognized by the Interstate Commerce Commission as quoted by appellant on pages 73 and 74 of its brief: "On October 12, 1906, the commission announced an administrative ruling as follows: 'Issuance and use of free passes. * * * But the commission does not construe the law as preventing a carrier from giving. * * * Nor does the commission construe the law as preventing a carrier from giving free or reduced rate carriage over its line to contractors for materials, supplies and men for use in construction, improvement or renewal work on the line of that carrier; provided such arrangements for such free or reduced rate carriage are made a part of the specifications upon which the contract is based, and of the contract itself.'" The arrangements for reduced rate carriage of men, material, and supplies were, in the case at bar, made a part of the specifications on which the contract was based, and of the contract itself.

The record discloses no reversible error, and the judgment of the lower court is therefore affirmed.

LEWIS and DOE, JJ., concur. CAMPBELL, J., did not participate in the decision of this case.

ATCHISON, T. & S. F. RY. CO. *v.* COFFIN et al.

(Supreme Court of Arizona, April 2, 1910.)

[108 Pac. Rep. 480.]

Carriers—Carriage of Live Stock—Notice of Claim of Loss—Validity.*—A stipulation in a contract for the shipment of live stock, made in consideration of a reduced rate, requiring written notice by the shipper to some officer of the company or to the nearest station agent of the initial or delivering carrier, before the stock are removed or mingled with other stock, of any claim for loss, or damage en route, is reasonable and valid in absence of a showing that it works hardship in the particular case.

Carriers—Carriage of Live Stock—Actions for Loss—Complaint—Alleging Performance of Conditions Precedent—Notice of Claim of Injury.—Since a stipulation in a contract for the carriage of live stock, requiring notice of claim of loss to be given the carrier before the stock are removed or mingled, is valid if reasonable in the particular case, in an action against the carrier for loss en route, the complaint should allege the giving of such notice if the stipula-

*See first foot-note of Atlantic Coast Line R. Co. *v.* Bryan (Va.), 33 R. R. R. 655, 56 Am. & Eng. R. Cas., N. S., 655.

tion is not invalid as a matter of law, or allege facts showing that it would work hardship in the particular case so as to excuse nonperformance.

Appeal from District Court, Yavapai County; before Justice Edward M. Doe.

Action by G. H. Coffin and another, partners as Bayless & Coffin, against the Atchison, Topeka & Santa Fè Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded with instructions to sustain demurrer to complaint.

Paul Burks and *John M. Ross* (*E. W. Camp,* of counsel), for appellant.

E. S. Clark, J. E. Russell, and *H. H. Linney,* for appellees.

CAMPBELL, J. This action was brought to recover damages alleged to have been caused by the negligence of the railroad company in transporting sheep from Del Rio, Ariz., to Kansas City, Mo. The complaint sets forth that the sheep were transported according to the terms of a bill of lading, a copy of which is attached to the complaint and made a part thereof. The instrument so attached is a special shipping contract, which recites that the shipper assents to its terms in order to obtain the lower of two rates, and is signed by the consignor. The eighth clause of this contract provides: "In order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the fact and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages for any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be unloaded or loaded for any purpose on the company's road, or previous to the loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination above mentioned, or from the place of the delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not move such stock from such station or stockyards until the expiration of three hours after the giving of such notice, and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages. * * *"

The complaint does not allege any notice of loss or injury to the sheep given prior to the time they were intermingled with

other stock. The defendant demurred to the complaint upon the ground, among others, that it appeared therefrom that the giving of notice under the eighth clause of the contract sued upon was a condition precedent to the maintenance of plaintiff's action, and the giving of such notice should therefore be alleged. The demurrer was overruled. The case went to trial, and at the close of plaintiff's evidence, notice not having been proven, the defendant moved the court to direct a verdict in its favor. This motion was denied. The court was then asked to instruct the jury that such notice was necessary, and that unless it was shown to have been given they must find for the defendant. The court declined to give this instruction. A verdict was returned in favor of the plaintiff, and from the judgment entered thereon, and from the ruling of the court denying a new trial, this appeal is brought.

The assignments of error requiring out attention raise the question as to the necessity of pleading and proving the notice required by the eighth clause of the contract. The trial court, it appears, held the stipulation contained in this clause to be unreasonable. The action is brought upon the contract. The performance of the condition is not alleged, nor is any excuse shown for nonperformance. If it may be said as a matter of law that the stipulation is invalid, it is not necessary that the complaint should contain the allegations indicated, but if it may not be so said, then it would seem logically to follow that where, as here, the action is based upon the special contract, the complaint should either show performance or excuse for nonperformance. World's Fair Mining Co. *v.* Powers (Ariz.) 100 Pac. 957. Authority is not lacking upon the precise point here involved. "If the stipulation is valid, then the giving of notice in accordance with its requirements is a condition precedent to recovery by the owner, and compliance or excuse for noncompliance should be alleged." 6 Cyc. 506.

In Case *v.* Railroad Co., 11 Ind. App. 517, 39 N. E. 426, where a stipulation to give notice was involved, it is said: "That such a provision as we are considering, where reasonable, must be regarded as a condition precedent, performance of which must be alleged to make the complaint good, was decided in Express Co. *v.* Harris, 51 Ind. 127, followed by this court in Railroad Co. *v.* Widman, 9 Ind. App. 190, 36 N. E. 370. To the same effect is Railroad Co. *v.* Simms, 18 Ill. App. 68."

In Metropolitan Trust Co. *v.* Railroad Co. (C. C.) 107 Fed. 628, the court had under consideration a stipulation in a shipping contract, providing for notice of damage. The court says: "In the complaint there is no allegation that the petitioner made a claim in writing, verified by affidavit, and delivered the same to some proper officer or agent of the receiver, Hunt. Nor does the complaint show any waiver or excuse for a failure so to do.

An averment showing the making of the claim under oath, and the delivery of it, as required by the contract, is a condition precedent, and is necessary to constitute a good cause of action." See, also, Osterhoudt *v.* Southern Pacific Co., 47 App. Div. 146, 62 N. Y. Supp. 134, Kalina *v.* Railroad Co., 69 Kan. 172, 76 Pac. 438, A., T. & S. F. Ry. Co. *v.* Means, 71 Kan. 845, 80 Pac. 604, and St. Louis & S. F. Ry. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75.

Stipulations in shipping contracts, requiring notice to be given of loss or damage to live stock before permitting the stock to be intermingled with other stock, have been upheld as reasonable in cases too numerous to cite here. They have been collected in exhaustive notes in the ninth and fourteenth volumes of the American and English Annotated Cases, at pages 17 and 416, respectively. In some states, such stipulations have been held invalid as an attempt upon the part of the carrier to limit its common-law liability. There are cases in which particular stipulations, involving uncertainty as to the agent of the company to whom notice was to be given, have been held unreasonable; and, generally where to give effect to the stipulation would serve to work a hardship upon the shipper, it is held inapplicable. Many of the cases cited by appellee are of the character first indicated. But it has been held by the Supreme Court of the United States, by whose views upon the subject we are bound, that stipulations requiring notice or damage do not limit the common-law liablity of the carrier, and, when reasonable, are valid. Express Co. *v.* Caldwell, 21 Wall. 264, 22 L. Ed. 556; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419. By the great weight of authority such a stipulation as the one involved in this case is held to be reasonable, in the absence of a showing that in the particular case it serves to work a hardship. In the Queen of the Pacific, supra, the court say: "The question is whether, under the circumstances of the particular case, the requirement be a reasonable one or not." Again, in discussing an opinion of the Supreme Court of Texas, in which that court held a stipulation unreasonable, it is said: "The court seemed to assume that the stipulation imposed a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed. The opinion seems to have gone off upon the point that, while the notice as applied to the facts might have been reasonable, it would be unreasonable when applied to a different state of facts. It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable, or worked a manifest injustice to the libelants, we should not give it effect."

The purpose of the stipulation is to prevent fraud upon the carrier, to enable the carrier to investigate the claim of the

shipper, and, if proper, to adjust it at once. As is said in Owen *v.* Railroad Co., 87 Ky. 626, 9 S. W. 698: "If executed in good faith, this stipulation must result in a benefit to both the owner of the stock and the carrier."

It follows that a stipulation which is not inherently unreasonable, but which is unreasonable when applied to a certain state of facts, should be met in the complaint by a recital of those facts which would make its application to the case unreasonable, as an excuse for nonperformance; and in the absence of such a statement of facts, the complaint should be held bad. We are of the opinion that the court erred in overruling the demurrer to the complaint in this case. The judgment of the trial court is therefore reversed, and the case is remanded to the district court, with instructions to sustain the demurrer; costs in both courts to be paid by appellees.

KENT, C. J., and LEWIS, J., concur. DOAN, J., did not participate in the decision of this case.

SPRITZER *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 256.]

Release—Burden of Proof—Question for Jury.—In an action against a carrier for injuries to a passenger, where the defense was a written release signed by plaintiff, the burden is upon plaintiff to avoid it, and if his testimony alone tends to overcome it, no matter how contradicted, it requires submission of the question of its validity to the jury.

Release—Personal Injuries—Validity.—A release executed by a railroad passenger shortly after an injury without fraud or misrepresentation of the raiload's agents, and while his mental condition was such that he was capable of comprehending and understanding his act and its nature, with its probable consequences, is valid.

Evidence—Parol Evidence—Contradicting Written Instrument.—Evidence to overcome a written instrument must be precise, clear, and indubitable.

Appeal from Court of Common Pleas Somerset County.

Action by Henry Spritzer against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. W. Storey, for appellant.
W. H. Ruppel and *George B. Somerville,* for appellee.

STEWART, J. In bar of the plaintiff's action, which was for the recovery of damages for personal injury and loss of personal property sustained in the wreck of a train of cars in which he was a passenger, the defendant pleaded a formal release executed and delivered by plaintiff before the bringing of the suit. The release was as follows: "1905, May 11. For the amount and for the account stated in the following release: Know all men by these presents, that I, H. Spritzer, in consideration of the sum of two hundred dollars (200) to me paid by the Pennsylvania Railroad Company, the receipt whereof is hereby acknowledged, do hereby release and forever discharge the said company from all liability to me for or on account of all losses, damages, personal injuries and all losses which I have sustained on account of the accident which occurred to train 10 near Harrisburg, May 11, 1905, on which I was a passenger, and by which I sustained personal injuries and losses. Witness my hand and seal the eleventh day of May, 1905.

"H. Spritzer, [Seal.]

"Witness present: Samuel W. Ihling.

"Received May 11, 1905, of the treasurer of the Pennsylvania Railroad Company two hundred dollars in full of the above amount. $200."

The genuineness of the instrument was admitted; but it was sought to avoid it on the ground that at the time it was executed plaintiff was "not in condition to know what he was doing." So reads the plaintiff's replication. The case went to the jury on this and other issues, and resulted in a verdict for the plaintiff. The submission of the question as to the integrity and sufficiency of the release is made the subject of the first assignment of error. Was the evidence on this branch of the case sufficient to carry it to the jury? A careful review of the testimony has convinced us that it was not. Starting with the presumption in favor of the release, the burden was on the plaintiff to show conditions which would avoid it in law. This burden he undertook to discharge wholly and exclusively by his own testimony. Not another witness was called in his behalf who testified to a single fact or circumstance in connection with the giving of the release, or to any fact or circumstance occurring within 12 hours thereafter, or to the plaintiff's condition at any time during this period, notwithstanding, according to his own testimony, the release was executed in a public place, where he was surrounded by many bystanders, and notwithstanding the further fact that within an hour or so thereafter, unassisted, he started on his journey home, distant more than 100 miles from the place of accident, in a passenger coach where, so far as shown

he was undistinguishable from the ordinary passenger. We remark upon this not as a circumstance to be considered in determining whether the question was one for the jury; for where in a common-law action the attempt is not to alter or contradict some of the terms of a written instrument, but to overcome it wholly and set it aside, the testimony of a single witness covering the point in controversy, no matter that it be contradicted by many opposing witnesses, requires a submission of the question of fact so raised to the jury. Gibson *v.* Western New York, etc., R. R. Co., 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586. We remark upon it simply to show the narrow limits within which our present investigation of the evidence is to be confined.

The accident occurred between one and two o'clock on the morning of May 11, 1905, near the city of Harrisburg. The plaintiff testified that he was thrown from the car, in which he was a passenger, by something like an explosion, not otherwise described or accounted for; and that while lying some 10 or 15 feet from the track he was picked up by some persons and carried in an unconscious condition to the hospital, where the injured had been assembled, and there placed upon a cot or stretcher. His examination in chief as to the occurrence proceeded in this wise: "Q. What became of you after they picked you up? A. I couldn't know what became of me. When I was in the hospital and opened my eyes, it was about three or four o'clock. I saw a whole lot of people, maybe 100 people lying on the floor, some on stretchers and on benches and all kinds of shutters and on the floor, ladies and children and gentlemen. Q. In the hospital? A. In the hospital; in the front room of the hospital. Q. What then occurred to you when you found yourself lying on the stretcher on the floor of the hospital? A. When I opened my eyes in the hospital—I believe I was in the hospital in a kind of a stupor for an hour or two, and I don't know how long I lay on that stretcher on the floor. It was dark, about one o'clock. When I opened my eyes in the hospital it was about three or four o'clock. Q. That morning? A. Yes, sir; the same morning that the wreck was, and I began to feel a very terrible pain in my shoulder and was very cold because I was naked; my underclothes was in pieces. Q. What clothes had you on? A. I had on just an undershirt and a pair of trousers, and they were torn in pieces. Q. Then what happened to you? A. Some of the people from the hospital. I couldn't know who they were came to me. Q. What did you do? A. I laid on that stretcher on the floor until a man come and asked me—told me to wait a little while—they were too busy with the ladies and children. All the wards were full of people. He said they would take me to a bed; they would take other rooms in the neighborhood, as the hospital rooms were all

full. Q. What did you say then, or what did you do? A. I said: 'No; I couldn't do it.' I told him they shall give me clothes and a ticket; that I was willing to go home, before I am dead. Q. Now, Mr. Spritzer, what did you do then? A. That man said: 'Wait a minute.' They called another man to me, I believe, and the other man said: 'Where do you live?' I told him at Windber. He said: 'Do you want to go home?' and I said: 'Yes; I want to go home; I wouldn't scare my family. I want to get home when I can.' He said: 'All right; I will fix you up.' In a few minutes that man and another man came with a pile of second-hand clothing in his hand, and some receipt book, some paper, something like a receipt book. He said: 'Write your name here and I will fix you up and you can go home. I will give you the clothes.' And two of them people took me, one held me by the hand and the other dressed me, gave me about 44 coat, a very big one; my size is a 34. They gave me a big straw hat, and a pair of shoes, but no stockings, some of them fellows took me outside and put me in a buggy, and they brought me, I suppose, to the Pennsylvania Railroad station, and they sat me in the car, and they sat down with me in the car."

We have here thus given all that was testified to by the plaintiff in his examination in chief touching his condition and the giving of the release. Something more was developed on his cross-examination. It proceeded: "Q. You say some person came to you while you were in the hospital with a paper? A. Yes; he had a paper in his hand. Q. That was about the time that you awoke, about daybreak? A. About three or four o'clock. Q. Will you look at that paper and say if you recognize it (release shown witness)? A. I said before that a man came in the hospital with a piece of paper, and said—Q. Look at that paper and say if you recognize that paper. Did you ever see it before? A. I say the name is mine. Q. Are both those names yours? A. Yes, sir. Q. Henry, when you signed that paper, did the gentleman give you anything? A. What gentleman? Q. The gentleman who handed you the paper which you say you signed. A. Yes, sir. Q. What did he give you? A. A check (check handed witness). Q. Will you look at that check and say if you ever saw it before? A. I was sick and didn't look at it. I couldn't recognize it. Q. Did you ever see that check before? A. He handed me a check when I was sick, and some of the people put it in my pocket. Q. Is that the check? A. I can't recognize that check. Q. You don't recognize it? A. You asked me about that check? Q. Yes, I am asking you about this particular check. How much was the check for that you got? A. After I found it I saw it was $200. Q. When this man handed you the paper how much did you tell him your losses were? A. He didn't ask me about the losses, I told him

that I had money. Q. How much did you tell this gentleman that you had lost by reason of this accident? A. He didn't ask me how much, I told him I had pretty near $200 in cash, and I couldn't buy a ticket because I had lost it." We have omitted nothing from the testimony of the witness which has even remote bearing on the question before us.

The least that can be required of one who attempts by his own uncorroborated testimony to escape from the binding force of a written agreement, which he admittedly executed, on the ground that at the time of its execution he did not understand the nature and character of the act in which he was engaged, is a direct, positive, and unequivocal statement from him that such was his attitude and condition of mind. If he was so far mentally incompetent that he is without recollection of the transaction, he can say so; if affected to a degree which leaves his memory of the transaction obscure and uncertain, he can say so; if surrounding conditions at the time he executed the paper were such as to preclude sensible and deliberate action, or make him the easy subject of fraud and imposition, and these were practiced upon him by misrepresentation or concealment, he is free to state all the facts in connection therewith. Where a party, under such circumstances, asserts nothing distinctly with reference to his mental condition at the time inquired of, testifies to nothing from which the degree of mental impairment, if any, can be discovered with even reasonable certainty, or nothing warranting an inference that his condition, whatever it was, was employed to extract from him an unconscionable bargain, and the case rests on his testimony alone, he has no right to an issue before a jury on the question of whether his contract is to be enforced against him or set aside. Was this plaintiff, when he executed the release in question, capable of comprehending and understanding his act, its nature, and probable consequences? He nowhere says he was not; he nowhere says he did not understand it; he does not say that he did not read the release, or that it was not read to him, or that its contents or effect were misrepresented to him. If this failure to testify directly as to these considerations on which his right to be relieved from his contract depended be overlooked, and his testimony be examined for facts from which his inability to comprehend the nature of the transaction might reasonably be inferred, failure here is quite as obvious. His testimony covered the particulars of his surroundings at the time, and occurrences in connection with the execution of the release, in a way that negatives the claim set up that he was without intelligent understanding. He was so far in possession of his faculties that he remembers and can recall with positive asservation what did, and what did not, occur in respect to himself, who were present and who were not, what he said, and what he did not say, during the

period to which this inquiry must relate. True, he says that he was carried from the place where he was found along the track to the hospital, and there placed upon a cot where he believes he remained "in a kind of a stupor for an hour or two," from which, however, he had recovered before anything was said or done about the release. What his injuries were, which produced this stupor, he nowhere states. So far as could be observed, he was without any, except some contusions which his own home physician testified did not injure him to any serious extent. The extent of his injuries and suffering, during the period he was at the hospital, appears from the following answer given by him in his examination in chief: "Yes, sir; the same morning that the wreck was, and I began to feel a very terrible pain in my shoulder and was very cold, because I was naked, my underclothes was in pieces." And this is all of his testimony with respect to his suffering. With what developed later we have no concern. It is, of course, possible that under such conditions as he described he may have lacked the power of free, intelligent action; but mere possibility will not sustain a legitimate inference of the existence of facts. The plaintiff's case presented nothing better.

There is nothing left in the case except the amount paid on the release, and the circumstance that the release was given within a few hours after the accident occurred. Neither could be for consideration except in connection with something shown in the case, which being so supplemented afforded a basis for a reasonable inference that the plaintiff did not have intelligent understanding of the transaction. If the plaintiff was himself, and understood what he was doing, the time when the release was executed is unimportant, and so, too, the consideration paid. In themselves these features of the case are of the slightest significance. The presumption in favor of the integrity of an instrument of this kind is not lightly overcome. Nothing short of evidence precise, clear, and indubitable can be allowed to overturn a written instrument. When it does not come up to this measure, the case should be withdrawn from the jury. Penna. R. R. Co. *v.* Shay, 82 Pa. 198; Gibson *v.* R. R. Co., 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586; De Douglas *v.* Traction Co., 198 Pa. 430, 48 Atl. 262. And that is clearly what should have been done in this case, assuming the testimony of plaintiff to be true, and giving no significance to the fact that it was contradicted with respect to everything material or important, even to the circumstance of his having occupied a cot in the hospital, by a number of disinterested witnesses.

The first assignment of error is sustained, the judgment reversed, and judgment is now entered for defendant.

BRAGG'S ADM'X *v.* NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia, March 21, 1910.)

[67 S. E. Rep. 593.]

Appeal and Error—Scope of Review—Demurrer.—Where a question involved upon writ of error arises on demurrer to the declaration, the court is only concerned with the averments of the declaration.

Carriers—Ejectment from Train—Drunken Passenger—Proximate Cause.—Where plaintiff's decedent, while in an intoxicated and irresponsible condition, had been ejected from a train at the second station beyond his destination, and was found the next day in an unconscious condition, and died on the same day, the failure to put him off at his point of destination, or at the next station reached by the train, was not the proximate cause of his death.

Carriers—Riding on Pass—Intoxicated Person—Passenger.—Where plaintiff's decedent, while riding on a pass, remained on the train, after he reached his destination, in an intoxicated and irresponsible condition, whether his remaining on the train was the result of defendant's negligence or of his mental and physical condition, he was entitled to be treated as a passenger.

Carriers—Passenger Carried beyond Destination—Carrier's Rights and Duties—Drunken Passenger.*—Where plaintiff's decedent, while in an intoxicated and irresponsible condition, had been carried past his point of destination, the carrier had the right to put him off the train, though, if it were negligent in carrying him by his station, it was its duty to return him to that point; but, if it knew of his condition, it should not exercise its lawful right of removal at a time or place, or under circumstances, where he would be exposed to great hazard.

Negligence—Reasonable Regard for Human Life—Duty of Person Exercising Rights—Performance of Duties.—All persons in the exercise of their rights, or in the performance of their duties, should act with a reasonable regard for the preservation of human life and the prevention of serious bodily harm, or the infliction of unnecessary injury upon others, and a person is generally held responsible for the manner in which his rights are exercised or his duties performed.

*For the authorities in this series on the subject of the duties and liabilities of the carrier with respect to passengers or prospective passengers in a state of in intoxication, see foot-note of Chesapeake & O. Ry. Co. *v.* Crank (Ky.), 29 R. R. R. 657, 52 Am. & Eng. R. Cas., N. S., 657; Stringfield *v.* Louisville Ry. Co. (Ky.), 29 R. R. R. 640, 52 Am. & Eng. R. Cas., N. S., 648; second head-note of Louisville & E. R. Co. *v.* McNally (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642; last head-note of Mobile, etc., R. Co. *v.* Jackson (Miss.), 30 R. R. R. 120, 53 Am. & Eng. R. Cas., N. S., 120.

Bragg's Adm'x *v.* Norfolk & W. Ry. Co

Carriers—Pleading—Declaration—Sufficiency.—A count in a declaration, which failed to allege facts either as to the weather or character of the grounds in and about a station, or that it was severely cold, or that the ground was covered with snow, or that the character of the place was such as made it dangerous, held not to state a cause of action for ejectment from a train at an improper place.

Carriers—Pleading—Declaration—Sufficiency.—A count in a declaration, stating that intestate was ejected from a train when night was rapidly approaching, the climatic conditions severe, the ground covered with 15 inches of snow, and that the conductor and other servants of defendant, on account of intestate's condition and surroundings, attempted to place him in care of a station agent, who, knowing decedent's condition, neglected to care for him, but permitted and actually saw him wander off alone down the railroad track, held to state a cause of action for ejectment from a train at an improper place.

Appeal from Circuit Court, Rockbridge County.

Action by Bragg's administratrix against the Norfolk & Western Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

C. S. McNulty, H. S. Rucker, and *Glasgow & White,* for appellant.

M. McCormick and *E. M. Pendleton,* for appellee.

BUCHANAN, J. This is an action to recover damages from the Norfolk & Western Railway Company for negligently causing, as is alleged, the death of the plaintiff's decedent.

The trial court held, upon demurrer, that neither of the two counts of the plaintiff's amended declaration stated a cause of action, and entered a final judgment in favor of the defendant company.

As the question involved in this writ of error arises on demurrer, we are only concerned with the averments of the declaration. It is averred in substance in the first count that the plaintiff's intestate, who was the telegraph operator of the defendant at Lochlaird, a station near Buena Vista, on the line of its road running from the city of Roanoke to Hagerstown, Md., on the 24th day of December, 1908, went to his home in Roanoke city on a trip pass issued to him by the defendant to travel from Buena Vista to Roanoke and return; that he remained at his home on that day until near 1:30 o'clock in the evening, when he boarded a passenger train of the defendant to return to his place of work; that when he entered the train he was more or less under the influence of some intoxicating liquor, or not in his right mind from other causes; that before the train reached Buena Vista he went to sleep, or for some

other cause became mentally irresponsible, and the defendant, through its negligence, failed to arouse him at that station, or aid him in leaving the train, but carried him on to the second station beyond his point of destination, where he was forcibly ejected from the train by the defendant when he was in a drunken and irresponsible condition, or had lost his reason and was crazy from causes unknown to the plaintiff, and when he was, on account of his said condition, unable to take care of and protect himself against the natural, inevitable, and immediate dangers to which he was exposed from being ejected at a sparsely settled station where he was not familiar with his surroundings; that when he was ejected at that place, notwithstanding his said condition and surroundings, in violation of its duty to him, the defendant failed to put him in a place of safety, or in charge of some one who would look after and guard him against the said dangers, when he was utterly incapable mentally and physically of protecting himself; that as the direct and natural result of the said negligence the plaintiff's intestate, being physically and mentally unable to care for and protect himself, wandered aimlessly in the cold, snow, and darkness along and on the railroad track of the defendant until, overcome by the cold and exposure, he fell beside the track, where he was found the next morning in an unconscious condition, and died that day. It is further averred that the said irresponsible condition, both mentally and physically, of the plaintiff's intestate at the time he was ejected, and while he was on the train, was known to the defendant.

The second count is substantially the same as the first, except that it contains the additional averments that when the plaintiff's intestate was ejected from the train night was rapidly approaching, and the climatic conditions were severe, the ground being covered with about 15 inches of snow; that the conductor and other agents of the defendant attempted, when the plaintiff's intestate was ejected, to place him under the care and protection of the station agent, in order that he might protect the decedent from the dangers into which he would naturally be expected to fall in his then said irresponsible condition; that the station agent, knowing the irresponsible mental and physical condition of the decedent, and that he had been placed in his care by the conductor and servants of the defendant to be cared for until the decedent could care for himself, wholly neglected to perform that duty, and declared that he did not have time to bother with a drunken or crazy man, and permitted and actually saw the plaintiff's intestate wander off alone in the rapidly declining afternoon, when the ground was covered with 15 inches of snow, and negligently failed and refused to make any effort to prevent the decedent from wandering away, when the natural, probable, and inevitable result would be his death.

Whether or not the defendant company was negligent in not waking up and putting off the plaintiff's intestate at Buena Vista, his point of destination, or at the next station reached by the train, need not be considered, as the failure to put him off the train at either of those places was not the proximate cause of his death. It is clear that the plaintiff's intestate, whether his remaining on the train after he reached his point of destination was the result of the defendant's negligence, or of his mental and physical condition, was under the averments of the declaration entitled to be treated as a passenger. 4 Elliott on Railroads, § 1578a; 2 Hutchinson on Carriers, § 1016, 1018.

When the defendant found that it had carried him beyond his point of destination, it had the right to put him off the train, though, if it were negligent in carrying him beyond his station, it would have been its duty to return him to that point; but, if it knew that he was in a helpless and irresponsible condition in body and mind, it should not have exercised its lawful right of removal at a place or time, or under circumstances, where he would be exposed to great hazard.

Hutchinson on Carriers (3d Ed.), § 1083, in discussing the subject of the right of a common carrier to eject females, or sick or intoxicated passengers, says: "Female passengers and passengers who are sick or suffering from some mental or physical infirmity necessarily cannot be ejected at times and places where the carrier should know that their sex or condition would especially expose them to insult or injury. And this rule is true, whether the attendant danger arises from natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surroundings, and perils, and his duty to avoid them, or does not possess the power of locomotion, and is put off the train by the conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner and at a proper place. But, in order to subject the company to liability for such an act, the condition of the person so ejected must be such that it would reasonably indicate to the carrier's servant that he, on account of his condition and the surrounding circumstances, would be liable to injury by being left at the place where ejected."

It is well settled that all persons in the exercise of their rights, or in the performance of their duties, should exercise their rights or perform their duties with a reasonable regard for the preservation of human life and the prevention of serious bodily harm, or the infliction of unnecessary injury upon others, and

that as a general rule they may be held responsible for the manner in which their rights are exercised or their duties performed.

The statement of the rule of law by Mr. Hutchinson is not only founded in reason but is fully sustained by the decided cases. See L. & N. R. Co. *v.* Johnson, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; Isbell *v.* New York, etc., Ry. Co., 27 Conn. 393, 71 Am. Dec. 78; Railway Co. *v.* Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; Conolly *v.* Crescent City R. Co., 41 La. Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389; Indianapolis P., etc., R. Co. *v.* Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; Roseman *v.* Carolina, etc., R. Co., 112 N. C. 709, 16 S. E. 766, 19 L. R. A. 327, 34 Am. St. Rep. 524; Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, 50 Am. Rep. 186; Brown *v.* Chicago, etc., R. Co. 51 Iowa, 235, 1 N. W. 487; Atchison *v.* Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; Southern Ry. Co. *v.* Back, 103 Va. 778, 50 S. E. 257; 4 Elliott on Railroads, § 1637.

In most, if not all, the cases, where the railway company has been held negligent for the manner in which it exercised its right to eject a passenger or other person from its train, it appeared that there was something in the condition of the weather and of the place where he was ejected that would naturally imperil his safety, in addition to his intoxicated condition.

In L. & N. Ry. Co. *v.* Johnson, supra, the passenger, who was very drunk, was ejected in a cut on the road, where there was no escape except up or down the railroad track, along the sides of which there was room for a person to walk. The night was dark, and it was raining. At one end of the cut there were cattle guards, which could be passed only by walking on the track. At this point the ejected passenger was struck and killed by a train.

In L. & N. R. Co. *v.* Sullivan, supra, the injured person, who was helplessly drunk, was expelled, not at a station, and in the snow.

The first count in the declaration under consideration wholly fails to aver any facts either as to the weather or the character of the grounds in and about the station. It alleges in general terms that the intestate was not familiar with the place and that it was sparsely settled. These allegations do not, in our opinion, show that the defendant was guilty of negligence in ejecting the intestate at that point. He was ejected in the daytime, at a regular station of the defendant, where there was a depot. It is not averred that it was severely cold, or that the ground was covered with snow; nor is any fact averred which shows that the character of the place was such as made it dangerous. We are of opinion, therefore, that the court properly sustained the demurrer to that count.

The second count, we think, states a good cause of action. In

addition to the averments of the first count, it states that the intestate was ejected when night was rapidly approaching, the climatic conditions severe, the ground covered with 15 inches of snow, and that the conductor and other servants of the defendant, on account of the intestate's condition and surroundings, attempted to place him in the care and protection of the station agent of the defendant; that the station agent, knowing the decedent's condition, and that he had been placed under his care and protection until he was capable of taking care of himself, neglected and refused to care for him, but permitted and actually saw the intestate in his irresponsible condition wander off alone down the railroad track, without making any effort to prevent it, although he had full knowledge of the intestate's irresponsible condition and the dangers which surrounded him.

The judgment of the trial court must be reversed, its judgment set aside, and such order entered by this court as the trial court ought to have entered, sustaining the demurrer to the first count, overruling it as to the second, and remanding the cause for further proceedings not in conflict with the views expressed in this opinion.

Reversed.

CLINE *v.* PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 850.]

Carriers—Injury to Passenger—Presumption of Negligence.*—Where a passenger in a crowded summer car by a sudden movement of the car is thrown beyond the guard rail and his head is struck by a car on the other track, but there is no injury to the car in which the passenger is riding, no presumption of negligence on the part of the company arises from the mere happening of the accident.

Carriers—Injuries to Passenger—Negligence—Burden of Proof—Sufficiency of Evidence.—In an action for injuries to a passenger on a street car, the burden is on plaintiff to prove negligence, which he may do sufficiently to carry the case to the jury, by showing that the car was unsafely run in passing over a curve which threw the passenger's head beyond the guard rail, so that it struck a car passing on another track.

*See first foot-note of Christensen *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; second foot-note of Sewell *v.* Detroit United Ry. (Mich.), 34 R. R. R. 453, 57 Am. & Eng. R. Cas., N. S., 453; first foot-note of Gay *v.* Milwaukee, etc., Co. (Wis.), 34 R. R. R. 1, 57 Am. & Eng. R. Cas., N. S., 1.

Cline v. Pittsburg Rys. Co

Appeal from Court of Common Pleas, Allegheny County.

Action by George J. Cline against the Pittsburg Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, and STEWART, JJ.

James C. Gray, Clarence Burleigh, and *William A. Challener,* for appellant.

Rody P. Marshall and *Thos. M. Marshall,* for appellee.

BROWN, J. The appellee boarded a car of the appellant on the evening of May 26, 1907. He was not able to get a seat, and stood between two of the cross-seats up against the guard rail on the left side of the car, holding on to an upright post with his left hand and to the seat in front of him with his right. The car was so crowded that a friend stood between him and the seat in front of him, encircled by his arms. As the car was passing over a curve, it gave, according to the testimony of the plaintiff and one of his witnesses, a sudden lurch or jerk, throwing his head beyond the guard rail just as a car on the adjoining track was passing in an opposite direction. That car struck him, and this suit is for the recovery of damages for the injuries sustained. There is no evidence that the car was running at a high rate of speed, the testimony of plaintiff's witnesses being that it was running at a good rate. From testimony offered by the appellant it seems that the accident happened on a straight track, and was due to the negligence of the appellee in sitting on the crossbar with his head projecting out far enough to come in contact with the passing car, and the jury were instructed that, if this was the situation, there could be no recovery.

After the appellee was allowed to become a passenger of the appellant on its crowded car, and he remained standing between two of the cross seats, with no part of his body extended beyond the crossbar, he was doing all that he could as a passenger under the circumstances, and the duty of the company in transporting him was to exercise the highest degree of care for his safety. If injury had befallen him as the result of an accident due to the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation, there would be a presumption of negligence on the part of the common carrier, and the burden would be upon it to show that the injury was in no way the result of its negligence. Thomas *v.* Phila. & Reading R. R. Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416. Here the only negligence of the defendant complained of is the sudden jerk or lurching of the car as it was passing over a curve. Nothing happened to the car itself. It went on after the injured passenger had been removed, just as if nothing had happened. Whether the car in

passing the curve was properly operated by the motorman was for the jury, but, under the court's instructions, complained of in the first assignment, the mere happening of the accident raised a presumption of negligence, and the burden was cast upon the defendant to disprove it. The instruction was: "You will understand that when an accident happens, such as described by the plaintiff, the burden is put on the defendant company to explain away the charge of negligence. It says there was no negligence and could not have been any negligence, because there is not any evidence here that the track was not in good condition, and because the evidence indicates that the car was not running more than five or six miles an hour at the time, and because it was a straight track." This was error. If the car was moving at a proper and safe rate of speed in passing over the curve, there was no act of negligence on the part of the appellant's employee to which the jerk or lurch can be attributed. The burden was therefore upon the plaintiff to show that the car had been run at an improper and unsafe rate of speed, which was responsible for throwing his body over the guard rail. Cars when passing from a straight line to a curve are always more or less jerky, but, if a jerk is inevitable at a proper and safe rate of speed, a common carrier is not responsible for exceptional injuries resulting from it. Its cars must continue to run on the curve as well as on the straight line; its only duty being to run them at a proper and safe rate of speed over the curve. Did this appellant do so in the present case? That was the question for the jury's consideration, and, before the appellee can recover, there must be a finding that the car had not been safely and properly run.

That the instruction complained of was error seems to be admitted by counsel for appellee, for the burden of their argument is that it must not be considered standing alone, as, from other portions of the charge, it clearly appears that the court submitted to the jury the question of defendant's negligence. The charge, however may be searched in vain for a single word of instruction that the burden was upon the plaintiff to establish the negligence of the defendant, and, from the quoted portion, the only inference to be drawn by the jury was that the mere happening of the accident made out a prima facie case for the plaintiff and cast the burden upon the defendant of disproving negligence. No burden was upon it, in view of the character of the accident, until it was first shown that the accident was the direct result of negligence. Among the cases requiring a reversal is Herstine *v.* Lehigh Valley R. R. Co., 151 Pa. 244, 25 Atl. 104. In that case the plaintiff at the time of the alleged injury was a passenger upon one of the defendant's trains. It was standing upon a track a short distance below the station, awaiting for another car to be attached to it. This car, as the plaintiff alleged, was run out of a siding nearby and allowed to drop by gravity down to and

against the rear end of the train with such violence that he and his wife were thrown forward from their seats against the seat in front of them and his spine was seriously and permanently injured by the wrench given him by the impact of the descending car. The trial judge instructed the jury, in substance, that the rule of Laing *v.* Colder, 8 Pa. 479, 49 Am. Dec. 533, controlled the case, and that "from the mere happening of an injurious accident a presumption of neglect arises, prima facie, and throws the onus of showing that it did not exist on the carrier." In reversing the judgment for the plaintiff we said: "This was misleading. There was no allegation that any accident had occurred to the train, or to any of the instruments or appliances of transportation. All that was alleged was that in the performance of the duty of coupling an additional car to the train the defendant's employees had negligently permitted the car to strike the train with more violence than was necessary to move the springs and effect the coupling. This was stoutly denied by the defendants and by the persons in charge of the car and the train at the time. Whether it was so or not was the subject of controversy, the primary question of fact for the jury to determine, since the plaintiff was left without a cause of action if the coupling was made in a proper manner. Upon this question the burden of establishing the negligence was on the plaintiff. There was no legal presumption arising from the facts of this case to shift the burden of proof. It is now well settled that the rule of Laing *v.* Colder is applicable to cases where a passenger is injured in, or because of, an accident happening to the train, boat or other means of transportation. The reason of the rule in such cases is that a contract to carry is, within the understanding of both parties, a contract to carry safely; and a breach of this contract by reason of the failure or insufficiency of any of the means provided for the carriage puts the carrier upon the defensive. The construction of its roads, cars, and boats, and their management and care, are subjects peculiarly within the knowledge of the carrier, and with which the passenger has no means of becoming familiar. When an accident occurs, therefore, the presumption is that it is due to the want of care in construction, repair, or management, and the burden of showing its own freedom from fault is on the carrier. But an accident to a passenger while about the premises of the carrier raises no such presumption (Hayman *v.* Penna. Railroad Co., 118 Pa. 508 [11 Atl. 815]); nor does an accident befalling a passenger while on board a train and in the course of his journey, unless it is connected in some way with the means of transportation. McKinney *v.* Penna. Railroad Co., 124 Pa. 462 [17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601]. Where the injury is chargeable to the manner of construction of a car, the rule does not apply if the

accident is to the passenger, and not to the car. Farley *v.* Traction Co., 132 Pa. 58 [18 Atl. 1090]."

The first assignment is sustained, and the judgment reversed with a *venire facias de novo.*

BLEW et ux *v.* PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania, Feb. 21, 1910.)

[76 Atl. Rep. 17.]

Carriers—Street Railways—Injury to Passengers—Evidence.*—Where an injury to a passenger on a street car is caused by a collision between the side of the car while on its track and a wagon, not under the control of the street railway company, no presumption of negligence arises in favor of the passenger against the street car company.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Robert M. Blew and wife against the Philadelphia Rapid Transit Company. Verdict for defendant, and plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Joseph Hill Brinton, John McClintock, Jr., and *A. Florence Yerger,* for appellants.

Thomas Leaming and *Owen J. Roberts,* for appellee.

PER CURIAM. The plaintiff was a passenger on the defendant's cars running north on Eighth street. She was seated on the east side near the middle of the car on a longitudinal seat, with her back to a window. A large ash cart was east of the track and near it. She testified that the car in passing the cart scraped against it, and the wheel of the cart broke through the window and struck her back, and she was thrown to the floor. Her testimony was uncorroborated, and was in direct conflict with her written statement made two days after the accident, except as to the breaking of the window. Six witnesses for the defendant, four of whom were passengers, testified that the car was standing still when the driver of the cart turned his horses to the east on a cross street, and, as his wagon swung around, the projecting end of the tailboard broke the glass; that no other part of the car was touched by the cart; that no passenger was thrown to the floor or injured in any way. The issue of fact raised was sub-

*See foot-note of preceding case.

mitted to the jury by a charge that was accurate, full, and entirely just to both parties.

No useful purpose would be served by review in detail the numerous assignments of error. The learned trial judge was clearly right in charging that no presumption of negligence arose from the fact that the plaintiff was injured while a passenger. The accident did not result from a defect in the means or appliances of transportation, but from a collision between the side of the car while it was on its track and an object not under the control or management of the defendant, as in Railway Co. *v.* Gibson, 96 Pa. 83. The request for charge was properly refused because of fatal defects in asking for peremptory instructions in favor of the plaintiff.

The judgment is affirmed.

GARDNER *v.* METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1, Nov. 27, 1909.)

[122 S. W. Rep. 1068.]

Evidence—Opinion Evidence—Subject-Matter of Testimony.—Persons who had observed and measured railway tracks with a yardstick or straight edge and a tape line could testify that one rail at a curve was an inch higher than the other, though they did not appear to be experts in such matters, and it was not shown that the measurements were made with a spirit level.

Trial—Rulings of Court.—Rulings of a court should be unequivocal and so definite in character as to leave no room for doubt by the jury as to what evidence is admitted and what excluded.

Appeal and Error—Reservation of Grounds—Failure to Assign Error in Motion for New Trial.—Where a court's rulings excluding various offers of testimony, and remarks of the judge made during the trial in the nature of comments on the evidence and mild criticisms of counsel were not assigned as grounds for new trial, so that the court correct itself, they will not be reviewed.

Evidence—Hearsay—Reports—Passenger—Actions — Admissibility of Evidence.—In an action for injuries to a street car passenger struck by a beam near the track, a report of the motorman to the company giving his version of the accident was inadmissible, as an ex parte account, not under oath, and affording no opportunity for cross-examination by plaintiff.

Witnesses—Examination—Refreshing Memory.—If the date of an accident is in doubt, a motorman could refresh his memory from a written report made by him to the company without admitting it in evidence.

Gardner *v.* Metropolitan St. Ry. Co

Carriers—Carriage of Passengers—Street Railways—Care Required.*—It is the duty of a street railway company to exercise that high degree of care for the safety of passengers that a very careful person would use under like circumstances.

Carriers—Injury to Passenger—Obstruction Near Track—Cross-Beam on Trolley Pole.†—If a cross-beam on a pole carrying cross-wires to support the trolley wire has been placed nearer to the track than a very careful person would have permitted under like circumstances, and the company knew of such condition, or by the exercise of such high degree of care might have known it in time to have remedied it, and prevented injury to a passenger therefrom, and failed to do so, it would be liable for the injury.

Carriers—Carriage of Passengers—Street Railways—Duty to Passengers.—Where a street railway company maintains a cross-beam carrying feed wires and bolted to one of the poles supporting a cross-wire which supports the trolley wire, the pole, cross-beam, and wire are necessary parts of the equipment used in furnishing the motive power for the cars, and the law imposes the same degree of care in providing such equipment as it does in furnishing safe cars in which passengers may ride.

Trial—Instructions—Inconsistent Instructions.—An instruction which in one clause states that a street railway company must exercise, for the safety of passengers, that high degree of care that a very careful and prudent person would use under like circumstances, and in another place states that it is only required to use ordinary care in that regard, being contradictory, is erroneous, as the jury had no means of knowing which one properly declared the law, and an appellate court has no means of knowing which one the jury followed.

Carriers—Street Railways—Injuries to Passengers—Admissibility of Evidence.—In an action for injuries to a street car passenger struck by a cross-beam near the track on a curve, evidence that one track at that place was higher than the other causing a car passing the beam, in rapid motion, to lurch, throwing the car near to the beam, was admissible on the question of the company's negligence.

Carriers—Street Railways—Injuries to Passengers—Burden of Proof.‡—The rule that a passenger makes out a prima facie case of

*For the authorities in this series on the subject of the degree of care required of a carrier of passengers, see second foot-note of Christensen *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; last head-note of Irwin *v.* Louisville & N. R. Co. (Ala.), 34 R. R. R. 11, 57 Am. & Eng. R. Cas., N. S., 11; Colorado & S. Ry. Co. *v.* McGeorge (Colo.), 33 R. R. R. 700, 56 Am. & Eng. R. Cas., N. S., 700.

†For the authorities in this series on the subject of the liability of carriers for injuries to passenger by collisions with objects or structures near tracks, see last paragraph of second foot-note of Lockwood *v.* Boston Elev. Ry. Co. (Mass.), 31 R. R. R. 395, 54 Am & Eng. R. Cas., N. S., 395.

‡See foot-note of third preceding case.

damages against a carrier for personal injuries when he shows that he was injured by a collision, and was himself free from negligence, applies only where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury, in which case the burden is upon plaintiff to prove his case and continues with him throughout the case.

Pleading—Sufficiency—Contributory Negligence—Cure by Verdict.—An answer pleading contributory negligence in general terms like a plea of negligence in general terms is good after verdict.

Carriers—Street Railways—Injury to Passengers—Sufficiency of Evidence—Contributory Negligence.§—In an action by a street car passenger for injuries from being struck by a beam near a track, evidence tending to show that he was riding with a portion of his arm protruding through the car window is sufficient to take the case to the jury on the question of contributory negligence.

Carriers—Street Railways—Injury to Passengers—Contributory Negligence.§—Such an act of the passenger would not be negligence per se, preventing a recovery.

Carriers—Street Railways—Injuries to Passengers—Pleading—Allegation and Proof.—In an action by a street car passenger for injuries, the very act of negligence alleged must be proved, and, where it was alleged that plaintiff was injured on a south-bound car on the west side of a viaduct, he could not recover upon proof that he was injured on a north-bound car on the east side of the viaduct.

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by Alfred G. Gardner against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

The plaintiff was a passenger upon one of defendant's street cars, and while being carried as such he sustained the injuries complained of. He brought this suit in the circuit court of Jackson county to recover the sum of $5,000 damages for those injuries. The trial resulted in a judgment for the defendant, and the plaintiff appealed.

The petition upon which the cause was tried, formal parts omitted, was as follows: "For his cause of action plaintiff states: That each of the defendants is a corporation, duly incorporated and existing according to law, and that both the defendants have their general offices in Kansas City, Mo. That at all the times hereinafter mentioned or concerned the defendants owned, controlled, and operated a street railway in Kansas City, Wyandotte county, Kan., extending from Fifth and Central streets, in said Kansas City, Kan., in a southwesterly direction to the northern approach of a viaduct, extending northward and southward

§See last foot-note of La Barge *v.* Union Elec. Co. (Iowa), 30 R. R. R. 298, 53 Am. & Eng. R. Cas., N. S., 298.

over certain railway tracks, on Seventh street in said city, and thence southward over said viaduct, and thence southward and eastward in said Kansas City, Kan., and finally to the stockyards which are located in both said Kansas City, Kan., and Kansas City, Mo. That at all said times said street railway was what is known as an electric railway; that is to say, the motive power which propelled the cars thereon was electricity, and was applied by means of what is known as a trolley wire running along above the tracks, and over the center of the cars, together with what is known as a trolley pole extending upward from the cars and fitting with a grooved pulley to the underside of said wire. That in constructing said railway the defendants placed a pole or log about one foot in diameter on the west side of said viaduct, and about three or four feet west from the west rail of the western track of said railway, and about 40 feet south from the north end of said viaduct, and stretched a crosswire from the upper end of said pole across and over said railway for the purpose of supporting said trolley wire, which trolley wire ran lengthwise with said railway. That the defendants also placed a cross-beam upon said pole, extending horizontally eastward and westward, for the support of two heavy cables, which rest upon the west end of said cross-beam. That cross-beam is of hardwood, and is about 4 or 5 inches square and 4 or 5 feet long, and is placed upon said pole about 5½ feet above the car track. That the defendants negligently and carelessly placed said cross-beam upon said pole in such a way that the east end thereof extends about 2½ feet eastward from said pole, and at all times mentioned herein has extended so near to the north rail of said railway that it almost scrapes upon the cars as they pass along toward the south in crossing said viaduct. That the defendants negligently laid the tracks of said railway, on the west side of said viaduct, in such a manner that the east rail of said western track, at the point opposite to said cross-beam, was at all times herein concerned about one inch higher than the west rail thereof, and in that manner caused the cars—as they passed said point—to lean or pitch over to the westward; and, when said cars were running rapidly, said inequality in said rails caused them to lean or pitch further toward the west than when running slowly. That said railway where it crosses said viaduct is a double-track railway, and at all times herein concerned the cars ran southward on the west track and northward on the east track thereof. That the defendants negligently ran their cars (including the car on which plaintiff was injured, as hereafter mentioned) along said west track and passing said dangerous cross-beam without placing the proper guards to the window thereof for the protection of passengers upon said cars. Plaintiff states: That on the 19th day of June, 1904, he boarded one of defendants' cars at said Fifth and Central streets, Kansas City, Kan., for the purpose of being carried

as a passenger to said stockyards, and paid his fare, to wit, five cents, to defendants' conductor in charge of said car. That said car had one seat on each side thereof running lengthwise with said car, and that the seat on the west side did not extend fully to the rear or north end of the car but that there was a space of about two feet between the end of the seat and the end of the car. That, when plaintiff entered said car, he found that both of the seats thereif were fully occupied by passengers, and plaintiff was obliged to stand, and that the most convenient and comfortable place that plaintiff saw in which he could stand was in said space between the end of the seat, on the west side of the car, and the rear or north end of the car, and that plaintiff accordingly took his position in said space. That plaintiff stood in said space with his face toward the front of said car, and with his right elbow and lower arm resting upon the window sill of the rear window on the west side of the car, and that said window was pushed down from the top thereof until the top of said window was about even with the window sill. That, through the negligence of the defendants, there was no guard or other protection to said window, except that there were two or three bars placed horizontally across the window about four or five inches apart, and that the lower rod or bar was about 11 inches above the window sill. That plaintiff did not know of said dangerous cross-beam or of said inequality of said rails. That, as said car approached said cross-beam, the servants of the defendants in charge of the same negligently ran said car at a rapid rate of speed, so that when the car struck said point where said rails were unequal as aforesaid, the car leaned or pitched over toward the west and thus caused plaintiff's elbow to slip upon said window sill toward the west and slightly outside of the car, whereupon said cross-beam struck plaintiff's arm over the ulna bone, and just below the elbow and cut plaintiff's arm to said ulna bone, and bruised and fractured the same, and thus forced plaintiff's arm backward and against the rear frame of said window, and broke the bone of plaintiff's arm just above the elbow, and forced the ends of said broken bone through the flesh and muscles of plaintiff's arm, and greatly bruised, wrenched, and dislocated plaintiff's elbow. Plaintiff states: That by reason of said injuries, he has suffered and still continues to suffer great physical pain and mental anguish, and was confined to his house about six weeks, and has not been able to perform his usual labor since said injury occurred, and was obliged to expend and to obligate himself to expend about $130 for the services of physicians, and about $10 for medicines, and was obliged to be nursed and cared for by his wife and children, and that their services in so doing were of the reasonable value of $75. That said injuries have resulted in a stiffening and malformation of plaintiff's right elbow joint, and in weakening plaintiff's entire right arm, and that said elbow and arm are thus per-

manently injured. Plaintiff states that he is a tailor by trade and has been such all his life, and has no other trade or calling by which to support himself and family, and that, by reason of the injures aforesaid, he is permanently disabled from pursuing said trade, and has lost and will lose his earnings in said trade during the remainder of his life, and that all said injuries have resulted from the negligence of the defendants in placing said cross-beam too near said car tracks and permitting it to remain so, in permitting said rails to be laid unequal in height and to remain so, in failing to protect the window of said car in the proper manner as above mentioned, and in running said car at too great a speed at said dangerous place, and that the defendants knew of the dangerous condition of said cross-beam and said car and said tracks, or by the exercise of reasonable diligence could have known of the same. Plaintiff states that, by reason of said injuries resulting from the defendants' negligence as aforesaid, he has been damaged in the sum of $5,000," etc.

The answer of the Metropolitan consisted of a general denial and a general plea of contributory negligence. The cause was dismissed as to the Kansas City Elevated Railway Company. The reply was a general denial. Plaintiff's evidence tended to prove all of the allegations of the petition, and that of the defendant tended to prove that the plaintiff was injured while a passenger on one of its cars on the day and at the hour, as shown by plaintiff, and on the same viaduct, but that the injury occurred while the car was going north, on the east side of the viaduct, instead of on the west side of the viaduct, while the car was going south, as alleged by plaintiff. Defendant's evidence also tended to show that the injury occurred about 150 yards south of where plaintiff claims it occurred, and that the injury was caused by plaintiff's arm coming in contact with a trolley pole, which stood on the west side, some 10 or 12 inches from the line of the car, as it passed, instead of coming in contact with a cross-beam which stood on the east side, about the same distance from the line of the car, as plaintiff's evidence tended to show. In other words, there was no question raised as to the fact that plaintiff was a passenger, and that he was injured by defendant while he was being carried as such; the difference between them being as to when and where the injury occurred, and the question of negligence and contributory negligence.

The plaintiff asked the court to instruct the jury as follows:

"(1) The court instructs the injury that if you find from the evidence that the plaintiff was a passenger on one of the cars then being operated by the defendant in Kansas City, Kan., on or about the 19th day of June, 1904, and that said car was at that time being run southward over a viaduct which passes over certain railroad tracks on Seventh street in said city, and if you further find from the evidence that there was at said time a pole

standing on said viaduct, and just west of the track on which said car was so running, and that there was a cross-beam bolted onto said pole in such a way that the east end of the same was very close to and within a few inches of said car as it was so passing along, and if you further find from the evidence that at said time, and while said car was so passing said cross-beam, the plaintiff's elbow or lower arm was brought into contact with said cross-beam, and that plaintiff was injured thereby, and if you further find from the evidence that at said time and place the defendant was guilty of negligence such as is defined in other instructions given you by the court, and that said injuries to plaintiff, if any, resulted from such negligence, then your verdict must be in favor of the plaintiff, unless you further find from the evidence that the plaintiff was guilty of negligence on his own part which directly contributed to said injuries.

"(2) The court instructs you that, if you find from the evidence that the plaintiff was a passenger on a car which was being operated by the defendant at the time and place referred to in other instructions, then it was the duty of the defendant to use and exercise that high degree of care, caution, and foresight for the safety of the plaintiff that a very careful and prudent person would use and exercise under like circumstances. And if you find from the evidence that at said time and place there was a post or pole standing at the west side of the track on which said car was running, and that there was a cross-beam bolted onto said pole in such a way that the east end of the same extended near enough to said track to endanger passengers on said car, and nearer to said track than a very careful and prudent person would have permitted under like circumstances, and that defendant knew of said condition of said cross-beam, or by the exercise of said high degree of care and caution might have known the same in time to have changed said cross-beam, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or, if you find from the evidence that at said time and place the window of said car at which the plaintiff claims to have been standing was not as well guarded or protected for the safety of passengers as a very careful and prudent person would have guarded or protected the same under like circumstances, and that defendant knew of such condition of said window, or by the exercise of said degree of care and caution might have known the same in time to have changed the same, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or if you find from the evidence that at said time and place the east rail of said track was higher than the west rail thereof, and that said inequality of the rails caused the car to lean or pitch over toward the west as it was passing said point, and thereby endanger passengers on said car, and that such inequality was

greater than a very careful person would have permitted under like circumstances, and that defendant knew of said condition, or could have known the same by the exercise of said degree of care in time to have repaired said track and prevented such injuries to plaintiff, if any, then defendant was negligent in said particular.

"(3) The court instructs you that the defense of contributory negligence, which is set up and charged by the defendant in this action, is an affirmative defense which must appear from the evidence, and that you cannot find a verdict against the plaintiff on this ground alone, unless it has been shown in the evidence that the plaintiff was guilty of some negligent act or acts on his own part which directly contributed to the injuries complained of. And such negligent act or acts must be such as a reasonably prudent person would not have been guilty of under like circumstances. In determining whether or not the plaintiff was guilty of contributory negligence, as herein defined, you will take into consideration all the facts and circumstances shown in the evidence, and, unless it has been shown in the evidence that the plaintiff was guilty of some act or acts of negligence which a reasonably prudent person would not have been guilty of under like circumstances, and that such act or acts directly resulted in the injuries complained of, you will not find a verdict against the plaintiff upon the ground of contributory negligence alone.

(4) You are further instructed that, if you shall find a verdict in favor of the plaintiff, you may assess his damages at such a sum, not exceeding $5,000, as you may believe from the evidence will be a fair and reasonable compensation to him: First. For such pain of body and mind, if any, as you may believe from the evidence that he has already suffered, and such bodily pain, if any, as you may believe from the evidence he is reasonably certain to suffer hereafter, as a direct result of the injuries complained of. Second. For such loss of earnings, if any, as you may believe from the evidence that he has sustained, or is reasonably certain to sustain hereafter, as a direct result of the injuries complained of. Third. For such permanent injuries to plaintiff's body if any, as you may believe from the evidence that he has sustained as a direct result of said injuries. Fourth. For such expenses for doctor's bills, if any, not exceeding $100, as you may find from the evidence that he has necessarily incurred and expended as a result of the injuries complained of."

The court gave said instructions numbered 1, 3, and 4, but refused to give 2 as asked, but modified it by striking out the words "said high degree of care and caution," and inserting in their stead the words "ordinary care," and by detaching and eliminating therefrom the following clauses: "Or if you find from the evidence that at said time and place the east rail of said track was higher than the west rail thereof, and that said in-

equality of the rails caused the car to lean or pitch over toward the west as it was passing said point, and thereby endanger passengers on said car, and that such inequality was greater than a very careful person would have permitted under like circumstances, and that defendant knew of said condition, or could have known the same by the exercise of said degree of care, in time to have repaired said track and prevented such injuries to plaintiff, if any, then defendant was negligent in said particular." The court gave instruction numbered 2 in its modified form. To which action of the court the plaintiff duly excepted.

The defendant, upon its part, prayed the court to instruct the jury as follows:

"(1) The court instructs the jury that the burden of proof is on the plaintiff to prove to your satisfaction by the preponderance of the credible testimony that defendant was guilty of negligence as submitted to you in these instructions, and this burden of proof continues and abides with the plaintiff throughout the entire trial; and, unless you believe and find from the evidence in this case that the plaintiff has proven by a preponderance of the credible testimony to your reasonable satisfaction that the defendant was guilty of negligence as defined in these instructions, and that such negligence was the proximate cause of the injuries complained of, then your verdict must be for the defendant. By 'preponderance of the evidence' is meant the greater weight of credible testimony.

"(2) The court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony, and, in determining what weight and credit you will give to the testimony of any witness, you should consider his or her conduct and demeanor on the stand, his or her interest in the case on trial, his or her opportunity to know and be informed as to the facts on which they undertake to give testimony, and their ability to clearly remember and to clearly state such facts, their willingness or unwillingness to testify to any facts of which you may believe they have knowledge.

"(3) It was the duty of the plaintiff to exercise ordinary care for his own safety, and if he failed to do so, and such failure on his part directly contributed to the injuries complained of, then he cannot recover in this case, and your verdict will be for the defendant, even though you may find that the defendant was also negligent as defined in these instructions. By ordinary care, as used in this instruction, is meant such care as would be exercised by an ordinarily prudent person under like circumstances.

"(4) The court instructs the jury that there is no evidence that the car of defendant was run at a negligent rate of speed at the time and place of the accident.

"(5) The court instructs the jury that this case should be considered by you the same as if it was a contest between two

persons of equal standing in the community. The fact that one of the parties is a corporation should not and must not affect your minds in any way in the consideration of the case. The rights of the parties should be and must be determined upon the evidence introduced and the instructions given to the jury, which are the law and the only law to guide you in your deliberations.

"(6) The court instructs the jury that if you find and believe from the evidence that the plaintiff knew or by the exercise of reasonable and ordinary care and diligence might or could have known, that if he put his arm out of the window, or through the bars upon the side of the car, there was danger of his arm being struck and injured and that he negligently put his arm out of the window or through the bars, and was thereby struck and injured, then your verdict will be for the defendant.

"(7) The court instructs the jury that, unless you find and believe from the evidence that the plaintiff has proven by a preponderance of the testimony to your satisfaction that he was struck by a cross-beam on the west side of the viaduct about 80 feet south of the north end thereof while riding south upon defendant's car, your verdict must be for the defendant.

"(8) If you find from the evidence that plaintiff was injured on a north-bound car and on the east side of the viaduct, and not on a south-bound car on the west side of the viaduct, your verdict will be for defendant."

The court, over the objections of plaintiff's counsel, gave to the jury the foregoing instructions. To which action of the court in giving same the plaintiff at the time duly excepted.

The errors assigned by counsel for appellant relate to the admission and rejection of testimony, and to the giving and refusing instructions. We will mention such parts of the evidence and such of the instructions during the course of the opinion as may be necessary for a proper determination of the questions presented for our consideration.

Theoph L. Carns, for appellant.
Jno. H. Lucas, for respondent.

WOODSON, J. (after stating the facts as above). 1. We will first consider the errors assigned regarding the rulings of the court as to the rejection of testimony offered by the appellant. Appellant offered the testimony of some two or three witnesses who had observed and measured with a yardstick or straight edge and a tape line the tracks of respondent just opposite the cross-beam mentioned in the evidence, to the effect that the top surface of the east rail of the west track was one inch higher than the west rail thereof. This evidence was offered for the purpose of proving that, when the car passed the cross-beam in rapid motion, it was thereby caused to lurch or pitch to the westward until the line of the car passed so near to said beam

as to throw appellant's arm against the same, and thereby inflicted the injury complained of. This evidence was by the court excluded, for the reasons that it was not shown that the witnesses who took the measurements were experts in such matters, and because it was not shown that the measurements were made with the assistance of a spirit level. The exclusion of that evidence was clearly erroneous, as will appear by reading the following authorities: 17 Cyc. 102, 104; Eyerman *v.* Sheehan, 52 Mo. 221; Heman Construction Co. *v.* O'Brien, 81 Mo. App. 639; McPherson *v.* Railroad, 97 Mo. 253, 10 S. W. 846; Charlton *v.* Railway, 200 Mo. 413, 98 S. W. 529; Hovey *v.* Sawyer, 5 Allen (Mass.) 554; Eastman *v.* Amoskeag, etc., 44 N. H. 143, 82 Am. Dec. 201; Vermillion *v.* City of Vermillion, 6 S. D. 466, 61 N. W. 802; Morrisette *v.* Railway, 76 Vt. 267, 56 Atl. 1102; Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532; Galveston, etc., Ry. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37; Olson *v.* Oregon Short Line, 24 Utah, 460, 68 Pac. 148; Lightfoot *v.* Traction Co., 123 Wis. 479, 102 N. W. 30.

The rule respecting measurements is stated as follows in 17 Cyc. p. 102: "An observer may state his estimate of size, including height, depth, breadth, thickness, and width, and any change in those or other dimensions. The statement is merely one of fact as to which any person who has applied the measurements may testify, with weight proportionate to his age and experience." And on page 104 of same volume it is said: "In the absence of adequate measurements, any person of adequate knowledge and judgment may state the grade of a ditch, of a hill, or a railroad track." In 5 Allen, 554, the Supreme Court of Massachusetts said: "As to where the highest point of a hill is, is a question upon which one man could not have any more or better means of forming an opinion than any other person of ordinary intelligence; and it is not a question for expert testimony." In Eastman *v.* Amoskeag, 44 N. H. 143, 82 Am. Dec. 201, the Supreme Court said: "In questions relating to heights and distances, and as to the number, quantity, and dimensions of things, a witness may not be able to testify without an implied expression of opinion; but this is no objection to the testimony upon such points and subjects." It has also been held competent for a witness to testify as to the height to which a stream of water was thrown, when his only criterion was the height of a house nearby, and he did not know the height of the house (Vermillion *v.* Vermillion, 6 S. D. 466, 61 N. W. 802), and for a witness to testify as to the size of a lantern simply upon inspection (Morrisette *v.* Railway, 76 Vt. 267, 56 Atl. 1102). So also held competent for a witness to testify that the grade of a ditch was not more than five feet to the mile. Here the appellant contended that, since the grade was a matter susceptible to exact measurement, the judgment

of the witness was not competent. But the court held otherwise, and stated that, although this evidence might be overcome by a showing of the exact measurements, still the evidence was competent. Posachane Water Co. *v.* Standart, 97 Cal. 476, 32 Pac. 532. It has been held competent for a witness to testify that there was a sharp curve and a sharp grade on the railroad at the point of accident. Galveston, etc., Ry. *v.* Ford, 22 Tex. Civ. App. 131, 54 S. W. 37; Olson *v.* Oregon Short Line, 24 Utah, 460, 68 Pac. 148. It is competent for a witness to estimate the height of a wood wagon. Lightfoot *v.* Traction Co., 123 Wis. 479, 102 N. W. 30. In this state a witness was permitted to give his estimate of the depth, or thickness, of broken stone. And the court further held that the witness might add his opinion under certain circumstances. Eyerman *v.* Sheehan, 52 Mo. 221. This court also held that it was competent for a witness to give his estimate of the distance of a crane from a passing train from his observation alone. Charlton *v.* Railway, 200 Mo. 413, 98 S. W. 529.

Counsel for respondent do not contend said evidence was not competent; but their insistence is that said evidence was in fact admitted by the court, and not excluded, as contended for by counsel for appellant. By reading page 56 of the abstract of the record, it will be seen that witness Carns testified as follows: "The east track was about an inch higher than the west track at that point. The east rail of the west track was about an inch higher than the west rail at that point, and, when Mr. Gardner and Mr. Gilley went over it, the track was in the same condition that it was when I first went there." And on page 59 appellant testified: "Well, we measured the east track, and we found it about an inch higher than the west one; that is, on the curve." While the record shows that Carns and appellant made the foregoing statements accredited to them, yet the ruling of the court is not clear and definite upon their admission until we reach the ruling of the court upon the admission of the testimony of the witness Bullock. On pages 109 and 110 of the abstract the following occurred: "Q. State to the jury what was the condition of the track over the viaduct, Mr. Bullock, with reference to its being either rail level with the other along the other side. A. The track was perfectly level. Mr. Carns: I object to that question until it is shown that the witness had knowledge of that particular time. The Court: Yes; and unless he put a level to it. Mr. Loomis: The other gentlemen did not. The Court: I held it was no evidence. There is no issue on that." This ruling of the court made definite and certain that which was before indefinite and uncertain. The rulings of the court should always be unequivocal and so definite in character as to leave no room for doubt in the minds of the jury as to what evidence is admitted and as to

what is excluded. Without the jurors know positively what evidence is to be considered by them, they are in no position to properly consider the case, or to return an intelligent verdict. Even without the last ruling of the court, its previous rulings were so indefinite and uncertain as to afford just grounds for complaint on the part of appellant; and, with the last added, there can be no doubt but what the effect thereof was to exclude all the evidence which tended to show the rails of the track were uneven at the place of the accident. This is also made clear by the action of the court in striking out of appellant's second instruction all reference to his right to a recovery on account of the uneven condition of the rails. This instruction will receive further consideration presently. The exclusion of this evidence was error. The exclusion of that evidence virtually took from the jury the charge of negligence regarding the throwing of appellant against the cross-beam.

2. Counsel for appellant also complains of the action of the court for excluding various offers of testimony; but by an examination of the motion for a new trial, as suggested by counsel for respondent, we find that none of those rulings was assigned as a ground for a new trial. This court will not reverse a judgment of the trial court for error which was not called to its attention in the motion for a new trial. Coffey *v.* Carthage, 200 Mo., loc. cit. 629, 98 S. W. 562; State *v.* Miles, 199 Mo. 530, 98 S. W. 25; State ex rel. *v.* Trust Co., 209 Mo., loc. cit. 494, 108 S. W. 97.

3. Certain remarks of the judge made during the progress of the trial, in the presence and hearing of the jury, in the nature of comments upon the evidence and mild criticisms of counsel for appellant, constitute the basis of this complaint. Whatever merit there might have been in this assignment appellant is in no position to complain, for the reason that the attention of the court was not called to those matters in the motion for a new trial. See authorities cited under the preceding paragraph.

4. The same is true with regard to the objection lodged against the testimony of the witness Ithry Fitzhugh giving his opinion as to appellant's condition at the time the injury was inflicted. The motion for a new trial did not call the attention of the court to this alleged error; consequently the court had no opportunity to correct its ruling regarding the admission of that testimony.

5. Over the objection of counsel for appellant, the court admitted in evidence the following written report of the injury, made by Joseph Floerke, motorman, who was in charge of the car which injured appellant:

Office of Metropolitan Street Railway Company. Kansas City Elevated Railway Company, 621 Temple Block, Kansas City, Missouri,

6-20, 1904. No. 49656. Mr. Jas. Floerke, 1512 North 19, Ks.: Your name having been returned to us by a conductor as one of the several witnesses to an accident which is said to have occurred on our line at 7th and Kansas—4:30 p. m. June 19, we therefore ask you, as a favor, to answer the following questions, in order to have as complete an account as can be obtained.

Respectfully,

Bernard Corrigan, President.

Questions.	Answers.
What is your full name?	Joseph Floerke.
Address?	1999 Dora Ave. K. C. Mo.
Occupation?	Junk dealer.
Did you see the accident? Give date and name.	June 19th, 4:30 p. m.
Where did it occur?	7th St. Wydock, K. C. Ks.
Where were you when the accident took place?	In front platform.
Was the train in motion?	Yes.
Was the bell ringing?	Not necessary at the point.
Do you know any one else that saw the accident? If so, give name and address.	No.
Who in your opinion is to blame for the accident?	The injured man.
Please give full account of the accident as witnessed by you, showing no favor to either side.	I have seen the man leaning or resting white his arm in raling or window protachen on car and the first post came in contact and the man got sick.

Date, June 19, 1904.

Joseph Floerke. [Signature.]

Address: 1999 Dora avenue, Kansas City, Missouri.

It was stated by the court that this report was admitted for the purpose of showing the date of the injury. Clearly the admission of this report was erroneous. There was no dispute as to the date of the injury. The petition stated that it occurred on June 19, 1904, and all of the evidence bearing upon that point which was introduced by both appellant and respondent showed the injury occurred upon that date. If the date of the injury had been in dispute, then the motorman could have refreshed his memory from the report, but the report itself was not competent, and should have been excluded. By its admission the jury was permitted to hear read the ex parte account of the injury made by the motorman, not under oath, nor was he cross-examined by any one on behalf of appellant. That evidence was highly prejudicial to him, and should have been excluded. Sharp *v.* Railway Co., 213 Mo. 517, 111 S. W. 1154. But, not withstanding this error was committed, we cannot reverse the judg-

ment therefor, for the reason that appellant did not complain of that error in his motion for a new trial. Consequently he cannot avail himself of it. Coffey *v.* Carthage, supra.

6. The action of the court in refusing to give for appellant instruction numbered 2, as asked by him, and in modifying it, and giving it in said modified form, is complained of as error by counsel for appellant. There are two errors assigned to that ruling.

It is first insisted that it was the duty of the respondent to use and exercise that high degree of care, caution, and foresight for the safety of the appellant that a very careful and prudent person would have used and exercised under like circumstances. And that the court should have told the jury that if they believed said cross-beam was placed nearer to the track in question than a very careful and prudent person would have permitted under like circumstances, and that respondent knew of said condition of said cross-beam, or, by the exercise of said high degree of care and caution might have known the same in time to have changed it and thereby prevented the injury, and that it failed to do so, then appellant was entitled to a recovery. This is clearly the law of this state, as has been held by this court in scores of cases. Lemon *v.* Chanslor, 68 Mo. 340, 30 Am. Rep. 799. This cross-beam was bolted to one of the poles which supported the wire which supplied the feed wire which furnished the electricity for the trolley wire. The pole, cross-beam, and wire were all necessary parts of the equipment furnished and used in furnishing the motive power for the cars. And the law imposed the same degree of care upon respondent in providing and furnishing that equipment as it did in furnishing safe cars in which passengers were to ride. In discussing this question, this court in the case of Och *v.* M., K. & T. Ry. Co., 130 Mo., loc. cit. 51, 31 S. W. 968, 36 L. R. A. 442, said: "While carriers of passengers are not insurers of their safety, and are not responsible when all reasonable care, skill, and diligence, prudence, and foresight have been employed, the law imposes upon them the utmost care and skill in selecting and furnishing safe means of transportation, and to that end to provide safe coaches and appliances, necessary for that purpose, including every part and parcel thereof, which very prudent men would exercise under like circumstances, and, when the injury to the plain was shown to have been occasioned by the falling upon her head of a ventilating window from the coach in which she was riding, then it developed upon the defendant to show by a preponderance of the evidence that the injury was caused by something not under its control, and not from any fault, want of care, or watchfulness upon its part. The same degree of care was required of defendant as to all parts and all kinds of its property used in the transportation of its passengers

as compared with liability to cause injury to them. The same rule applies when the injury is caused by the want of diligence or care by those employed by the carrier. In Meier *v.* Railroad, 64 Pa. 225, 3 Am. Rep. 581, it was said: 'Prima facie, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it.' * * * This is the rule when the injury is caused by a defect in the road, cars, machinery, or by a want of diligence or care in those employed, or by any other thing which the company can or ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive." See, also, Clark *v.* Railroad, 127 Mo. 197, 29 S. W. 1013; Dougherty *v.* Railroad, 81 Mo. 325, 51 Am. Rep. 239. The refusal of the court to give appellant's instruction which so declared the law was error. But counsel for respondent insists that the court so instructed the jury. In a sense that is true, but it is also true that in the same instruction at another place the court told the jury that respondent was only required to use ordinary care in that regard. So the most that can be said of this instruction is that the two clauses mentioned are inconsistent with and contradictory of each other. Such an instruction is erroneous. The jury had no means of knowing which of the two properly declared the law of the case, and we have no means of knowing which of the two the jury did follow.

And the second error urged against the ruling of the court relates to its action in striking therefrom the paragraph submitting to the jury the question of respondent's negligence in constructing and maintaining the east rail of the track in question higher than the west rail thereof, and that, in consequence thereof, the car was caused to lurch or pitch so near to the crossbeam as to injure appellant's arm. The evidence which tended to prove those facts should have been admitted, as before stated, and this clause of this instruction should have been given, submitting that question to the jury. This question came before this court in the case of Gage *v.* St. Louis Transit Co., 211 Mo. 139, 156, 109 S. W. 13, 18. This language was there used: "Plaintiff complains of the action of the court in refusing to permit her to prove that street cars while in motion will rock and sway from side to side on account of the inequalities of the track. We are of the opinion that said ruling was not error, for the reason that it is common knowledge that a car being propelled by steam or electricity over a railroad track will be swayed by inequalities of the track. Geitz *v.* Railroad, 72 Wis. 307, 39 N. W. 866; Railroad *v.* Smith, 25 App. D. C., loc. cit. 271 (5 L. R. A. [N. S.] 274). The juror's knowledge of those facts is equal to that of any witness who might testify upon the subject. The swaying of the car is caused by the operation of

the law of gravity and the mechanical forces used in propelling the car. When a wheel of the car comes to a low place on the rail, the law of gravity carries it to the lowest point, and the mechanical forces operating upon the car in turn, raise it to the highest point of the rail. This motion of the car will cause the car to rock from side to side where there are inequalities in the surface of the two rails; and if there are no inequalities, but both rails are depressed alike, then the motion of the car will be from end to end, and not from side to side. All men of ordinary intelligence and observation know those facts; and the testimony of witnesses explaining those motions and their causes would shed no additional light upon the question. It is proper, however, to show whether or not the surface of the rails and tracks at the point of the injury were even or uneven at the time of the accident."

We are therefore of the opinion that the court erred in excluding said evidence and in refusing appellant's second instruction as asked; and also in modifying it and giving it in its modified form.

7. Instructions numbered 1 and 7, given on behalf of respondent, are complained of by counsel for appellant. They, in effect, told the jury that the burden of proof was upon appellant to prove his case, and that said burden continued with him throughout the case. Appellant invokes the doctrine that a passenger makes out a prima facie case of damages against a common carrier for personal injuries when he shows that he was injured by a collision and was himself free from negligence Olsen *v.* Citizens' Ry. Co., 152 Mo. 426, 54 S. W. 470; Orcutt *v.* Century Building Co., 214 Mo. 35, 112 S. W. 532. This rule only applies where the petition charges negligence in general terms, and does not apply where it specificially pleads the negligent acts which caused the injury, as the petition in this case does. Beave *v.* Transit Co., 212 Mo. 331, 111 S. W. 52; Klebe *v.* Distilling Co., 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140; Kirkpatrick *v.* Metropolitan St. Ry. Co., 211 Mo. 68, 109 S. W. 682. We therefore hold under the pleadings in this case there was no error in giving the instructions complained of.

8. It is the next insistence of counsel for appellant that the court erred in submitting to the jury the question of contributory negligence. It is first claimed the court erred in that regard for the reason that contributory negligence was not pleaded. Counsel is in error in this. The answer pleads contributory negligence in general terms, which, like a plea of negligence in general terms, is good after verdict. The second contention is that there was no evidence which tended to show appellant was guilty of contributory negligence. Counsel is also in error in this matter. The evidence tended to show that appellant was riding with a portion of his arm protruding

through the car window. This alone was sufficient to justify the court in submitting to the jury the question of contributory negligence. Gage *v.* St. Louis Transit Co., 211 Mo. 139, 109 S. W. 13. There was no error in submitting the question of appellant's contributory negligence to the jury. But the court should not have told the jury that such act constituted negligence per se, and would prevent a recovery. Gage *v.* St. Louis Transit Co., supra; Murphy *v.* Railway, 115 Mo. 111, 21 S. W. 862; Seymour *v.* Citizens' Ry. Co., 114 Mo. 266, 21 S. W. 739.

9. The final insistence of counsel for appellant is that instructions numbered 7 and 8 given by the court on behalf of appellant are erroneous. They, in effect, told the jury that, if unless they found from the evidence that appellant was struck by a cross-beam on the west side of the viaduct about 80 feet south of the north end thereof while he was riding south upon one of respondent's cars, then their verdict should be for respondent. The petition charged and appellant's evidence showed that he was injured on a south-bound car and on the west side of the viaduct; while the evidence of respondent tended to show that he was injured on a north-bound car and on the east side of the viaduct. Appellant contends that, if it be conceded the respondent's version of the facts was true, still that was not such a total departure between the allegations of the petition and the proof as would prevent a recovery, but was simply a variance which was not fatal to a recovery. We are unwilling to lend our assent to this insistence, but are in full accord with the following views expressed by counsel for respondent upon that subject. "It was charged that a certain combination of circumstances produced the injury. These were: A cross-beam placed too close to the west track, about 80 feet south of the north end of the viaduct; that the east rail of the west track, at that particular point, was an inch higher than its mate; that this car was run over this spot at an excessive rate of speed, which caused the car to lurch or lean toward this cross-beam, and the injury was thus produced. Plaintiff can only recover by proving that he was hurt by some one or all of these acts. No law is better settled than this." There is no pretense that these same conditions existed at the place where respondent's evidence showed the injury occurred; but concede that the same condition did exist. Still they were not the same as those charged in the petition, and which appellant's evidence showed did exist in fact, and which caused the injury. "The very act of negligence alleged must be proven, if a specified act is alleged." Spiro *v.* Transit Co., 102 Mo. App. 261, 76 S. W. 684; McCarty *v.* Hotel Co., 144 Mo. 397, 46 S. W. 172; Fuchs *v.* St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136;

Hite *v.* Railroad, 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555. The court properly gave said instructions.

The judgment is reversed for the errors before pointed out, and the cause is remanded to the circuit court for a new trial. All concur.

TABER *v.* SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Nov. 26, 1909.)

[66 S. E. Rep. 292.]

Appeal and Error—Determination of Cause—Proceedings in Trial Court.—Under Sup. Ct. Rule 27 (56 S. E. v), providing that when an appeal is sustained on the ground that a nonsuit should have been granted for want of evidence, the reversal shall have the effect of a nonsuit or directed verdict, the reversal for failure to grant a nonsuit as to punitive damages requires the trial court, on remand, to eliminate the issues as to such damages.

Appeal and Error—Determination of Cause—Law of Case.—Where the decision on review was that the refusal to grant a general nonsuit was proper because there was some evidence to sustain the action, it is error to grant a nonsuit on the second trial; the evidence being substantially the same.

Carriers—Delay of Passenger—Negligence—Question for Jury.*—Where there is evidence that a passenger was delayed 8 or 10 hours, and because thereof incurred an extra expense of $2.50, the question of negligence should be submitted to the jury.

Carriers—Duty to Run Cars on Schedule Time.*—It is ordinarily the duty of the carrier to run its trains on schedule time, and make advertised connections, and it is liable for injuries resulting from a negligent failure to do so.

Carriers—Negligence—Burden of Proof.†—Where a carrier has failed to make its schedule time to the injury of a passenger, a presumption of negligence arises, and the burden is on the carrier to show that such failure was not due to its negligence.

Carriers—Liability for Acts of Pullman Car Porter.‡—A railroad company may be liable for the acts of a Pullman car porter, if such acts affect the safe and comfortable transportation due a passenger under his contract with the company.

*See extensive note, 33 R. R. R. 636, 56 Am. & Eng. R. Cas., N. S., 636.

†See generally extensive note, 31 R. R. R. 697, 54 Am. & Eng. R. Cas., N. S., 697.

‡See third foot-note of Campbell *v.* Seaboard A. L. Ry. (S. Car.), 33 R. R. R. 230, 56 Am. & Eng. R. Cas., N. S., 230.

Taber v. Seaboard Air Line Ry

Appeal from Common Pleas Circuit Court of Barnwell County; Geo. W. Gage, Judge.

Action by Louisa B. Taber against the Seaboard Air Line Railway. From a judgment for defendant, plaintiff appeals. Reversed.

Frank G. Tompkins and *Edgar M. Tompkins,* for appellant.
Lyles & Lyles and *E. L. Craig,* for respondent.

JONES, C. J. This is an appeal from a judgment of nonsuit. The nature of the action and the general facts will fully appear by reference to the decision on the former appeal. 81 S. C. 317, 62 S. E. 311. On that appeal the court reversed the judgment of the circuit court in favor of plaintiff, on the ground that there was no evidence of any willful breach of duty by defendant, and therefore the court erred in not granting defendant's motion for nonsuit as to punitive damages, and in refusing to direct the jury not to award such damages.

On the second trial Judge Gage, while admitting the testimony offered by plaintiff, ruled that he would instruct the jury not to award punitive damages because of the decision in the former appeal. This was proper under rule 27 (56 S. E. v) of this court, which provides: "Whenever an appeal to this court is sustained on the ground that a nonsuit should have been granted or a verdict directed because of a total failure of evidence or because the evidence should admit of but one inference, the reversal of the judgment shall have the same effect as if the nonsuit had been ordered, or a verdict returned under the direction of the circuit judge." This rule was adopted December 19, 1906. The action was commenced in February, 1907; was first tried in December, 1907. The former appeal was decided September 11, 1908, and the second trial had October 5, 1908, previous to the amendment of the rule adopted December 12, 1908, adding these words: "Provided that this rule shall not be applicable when the cause of action was not barred by the statute of limitations at the time said orders were refused on circuit, but would be barred at the time they were reversed by the Supreme Court." The case is not affected by this amendment in any event, as the cause of action arose April 16, 1906. But even if the rule were inapplicable there was no error, as the testimony introduced, and proposed to be introduced, was not substantially different from the testimony on the former trial, which this court held did not tend to show any willful breach of duty.

We think, however, that the court erred in granting a nonsuit as to the cause of action based on negligence. This matter was also considered in the former appeal, and the conclusion reached was that there was some evidence of negligence resulting in

some actual damage to plaintiff, and that there was no error in refusing nonsuit as to the cause of action for negligence. Except in one or two particulars not controlling, the testimony was substantially the same as in the former trial, and the court held that this case was one to be submitted to the jury.

On the former appeal the court considered that there was testimony that if the conductor had given plaintiff the information, she could have made immediate connection at Norlina with a train to Portsmouth, as such a train left shortly after the arrival of her train at Norlina. This matter was fully cleared up by the testimony in the second trial. The train to Portsmouth left Norlina before the arrival of the train bearing plaintiff, which was two hours late, and hence the connection at Norlina was not made until after a delay of 8 to 10 hours.

We are not influenced by the suggestion that plaintiff, if informed, might have gone on to Petersburg, and then taken the Norfolk & Western line to Portsmouth, as defendant had no connection with Portsmouth by way of Petersburg, and there was no evidence that plaintiff could have reached Portsmouth sooner by way of Petersburg, and no evidence that she would have attempted such longer route, for which she had no ticket. It also clearly appears by plaintiff's testimony that she incurred no expense by reason of the delay at Norlina, as, excepting the delay itself, she had every reasonable attention extended to her at Norlina, and no complaint is made of any improper treatment during the final transportation from Norlina to Portsmouth.

The former decision eliminates from the case all question as to punitive damages, and all questions as to damages claimed for mere worry or mental anxiety, or mental suffering, disconnected from bodily injury, for which the common law, as administered in this state, affords no redress.

There was some testimony that the delay in transportation helped to make plaintiff sick, and to cause a nervous breakdown. In the former opinion the court held that if there was a nervous breakdown as the direct result of defendant's negligence, for such bodily suffering there should be some compensation. Moreover, it is not disputed that plaintiff lost 8 or 10 hours of time, and for which there should be some compensation, if defendant's negligence caused such loss of time. Furthermore it appears that plaintiff expended $2.50 for Pullman service from Hamlet to Norlina, which expenditure, in whole or in part, may not have been necessary if plaintiff had been informed at Hamlet, as she should have been, that her proper course, in view of the failure of connection, was to stay over at Hamlet, rest, and wait for the next connection No. 38, the same train she took at Norlina. Plaintiff's case depends upon the question whether there was negligence on the part of defendant in making the schedule connection at Hamlet or Norlina. Ordinarily

train 84, upon which plaintiff left Columbia, connected at Hamlet with train 32, then these trains consolidated, and ran as 84 to Norlina, where the consolidated train split, 84 going to Richmond, and 32 going to Portsmouth. According to the testimony for defendant 84 reached Hamlet about one hour and a half late, having three coaches in train more than usual, having been delayed 38 minutes at Columbia, 20 minutes because Jumping Gully trestle was on fire, 9 minutes at Camden handling an unusual amount of baggage, and 21 minutes because the engine failed to steam well on account of bad coal. Because of this delay, and the further fact that 84 and 32 jointly had an equipment too heavy for one engine to pull, 32 passed Hamlet without consolidating with over defendant's line until 38 came along 84, and went on to Portsmouth, making it impossible for plaintiff to reach Portsmouth next day. As declared in the former appeal: "Mere representations as to schedules and connections are not to be considered as guarantees, still it is ordinarily the duty of the carrier to run its trains on schedule time and make the usual advertised connections, and it is liable for any injury directly resulting from any negligent failure to make such schedule and connections." The court further declared: "When it is shown that the carrier has failed to make its schedule and connections, and this results in an injury to a passenger, a presumption of negligence arises, and the burden is cast upon the carrier to show that such failure was not due to its negligence. Miller *v.* Southern Ry., 69 S. C. 135, 48 S. E. 99." The court referred to the explanation given of the delay, and declared that such explanation did not conclusively rebut the presumption of negligence, and we must again so hold, as the explanation is substantially the same as in the former trial. The 38 minutes' delay in Columbia; the fact that a trestle should be allowed to be on fire; the use of the bad coal—were not so conclusively explained as to authorize the court to declare, as matter of law, that there was no negligence in any of these matters affecting the operation of the train and causing delay. Mulligan *v.* Southern Ry. (Nov. 4, 1909) 65 S. E. 1040.

It seems that on the trial the court and counsel misconceived the meaning of the opinion of the court on the former appeal in the language used in considering whether the failure of the Pullman porter to make up plaintiff's berth was a breach of the defendant's duty as carrier. This court said: "Conceding that the porter was negligent, or even willfully disregardful of plaintiff's request in this matter, the defendant company is not liable in the absence of evidence connecting it with the special contract of the Pullman Company. The delict, if any, was a breach of duty by the Pullman Company, since it appertained peculiarly to the contract of that company to furnish berth accommodations as distinguished from the defendant's contract of

safe and comfortable transportation." As shown in Campbell *v.* Seaboard Air Line Ry., 83 S. C. 452, 65 S. E. 628, this is a sound and obvious distinction, but it affords no ground for holding that a railroad carrier is not liable for the acts of Pullman employees affecting the safe and comfortable transportation of a passenger under his contract with the carrier.

We do not deem it important or necessary to consider the exceptions in detail. The foregoing sufficiently disposes of all material questions.

The judgment of the circuit court is reversed.

CARY et al. *v.* LOS ANGELES RY. CO.

(Supreme Court of California, April 13, 1910.)

[108 Pac. Rep. 682.]

Carriers—Injury to Passenger—Starting Car—Signal by Another Passenger.—There was no negligence of a street car company in the starting of a car, throwing a passenger who was alighting, the starting signal, two bells, having been given, without authority, by another passenger, neither the motorman nor conductor having any reason to believe it would be so given, the motorman believing it was given by the conductor, conductor instantly on hearing the signal calling to the motorman not to start, and the motorman then endeavoring to prevent the starting; the company, through its motorman and conductor, not being required to anticipate and take precautions against such an unauthorized signal.

Carriers—Injury to Passenger—Negligence—Pleading and Proof.—The only allegation of negligence in an action for injury to a passenger on a street car being that, while he was alighting, the car was negligently started with a jerk, the fact that the car was crowded, and passengers were standing in the aisle, cannot be considered as a matter of negligence, but only as a part of the conditions existing at the time.

Negligence—Pleading.*—While negligence may be charged in general terms, the particular act relied on as negligence must be specified.

Carriers—Injury to Passenger—Actionable Negligence.—While violation of Civ. Code, §§ 2102, 2184, 2185, providing that a carrier of passengers must not overcrowd or overload his vehicle, must provide a sufficient number of vehicles to accommodate all passengers who can be reasonably expected to require carriage at the time, and must provide every passenger with a seat, will establish negligence, it will

*For the authorities in this series on the subject of pleading negligence, see second foot-note of Lexington Ry. Co. *v.* Britton (Ky.), 33 R. R. R. 237, 56 Am. & Eng. R. Cas., N. S., 237.

not authorize recovery for injury to a passenger, while alighting, from being thrown by the starting of the car, on the unauthorized signal of another passenger; it not being shown to have any direct and causal connection with the injury.

Carriers—Duty of Conductor—Instructions.—The collection of fares being part of the duty of the conductor of a street car, though it is equally his duty to look after the safety of his passengers, it is not error to instruct that he was in the performance of his duty while collecting fares; it appearing that he was collecting fares when the car stopped, that before giving his starting signal he would have gone to the platform to see whether all passengers so desiring had alighted, and that before he had done so a starting signal was given by a passenger, resulting in injury to another passenger, who was alighting.

Trial—Directing Answers by Jury.—It is not an invasion of the province of the jury to direct answers to questions not in dispute and established without contradiction.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Sarah P. Cary and another against the Los Angeles Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

Hannon & McCormick, for appellants.
Gibson, Trask, Dunn & Crutcher, for respondent.

HENSHAW, J. This action was instituted by plaintiffs to recover damages alleged to have been sustained by plaintiff Sarah P. Cary while debarking from one of defendant's cars. The negligence, and the only negligence charged against defendant is found in the following allegation: "And as said Sarah P. Cary was in the act of leaving said electric car, while the same remained stopped, and while in the act of stepping off of said car, the said defendant, through its agents and servants, negligently and carelessly and wantonly caused the said car to start forward with a sudden jerk, and with great force, thereby throwing said Sarah P. Cary violently from said electric car and onto the ground, whereby the said plaintiff sustained serious bodily injuries." The answer denied negligence. The case was tried upon the issue of defendant's negligence, and on that issue the jury returned a general verdict in favor of the defendant, together with a special verdict, by which latter they found that two bells were a signal used by the conductor to the motorman to start the car, and that it was not the duty of the motorman, under the rules of the company, nor was it a custom of the motormen, upon receiving the signal of two bells, to ascertain whether passengers were alighting from the rear steps. That the car stopped at a street for the purpose of allowing plaintiff to alight therefrom. That the conductor was at that time at the front of the

car collecting fares. That the signal of two bells was given by some passenger standing at the rear of the car. That the motorman supposed it was given by the conductor, and at once started the car. That instantly upon hearing the two bells the conductor cried out, warning the motorman not to start, but to stop his car. The motorman thereupon endeavored to prevent the starting of the car. That the car moved only from two to six feet. That neither the conductor nor the motorman had any reason to believe that any signal, by bell or otherwise, would be given by any other person than the conductor. That the proximate cause of the injury to plaintiff arose from the unauthorized act of the passenger in giving the signal to the motorman to start the car.

The evidence abundantly supported the special verdict and findings of fact above set forth. The only question upon the verdict is whether or not the facts themselves constitute a defense. Appellants present no authorities against the proposition that the facts found by the jury show an absence of negligence on the part of the defendant, and establish that the accident occurred by the unwarranted intervention of an unauthorized stranger, against whose unexpected act the company was not bound to take precautions. That such is the law governing the conduct of defendants in such cases is abundantly settled. Thus in Krone *v.* Southwest Mo. E. R. Co., 97 Mo. App. 609, 71 S. W. 712, the trial court refused to give an instruction which declared: "The court instructs the jury that, if they believe from the evidence that the conductor stopped the car at Elizabeth street to let Mrs. Kirksey and plaintiff get off said car, and that Mrs. Kirksey got off, and, before plaintiff could get off, some one, not an employee of the defendant, without the knowledge or authority of the conductor, rang the bell, and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car, and plaintiff fell off, then there was no negligence on the part of defendant, and plaintiff cannot recover in this case, and their finding will be for defendant." The Supreme Court said: "We cannot see upon what theory the court refused said instruction, for if it was true that some person other than the conductor, and not in defendant's employ, gave the signal which started the car while plaintiff was attempting to get off, causing her fall and injury, it was not the result of any negligence on the part of defendant, but that of a careless or mischievous stranger, over whom the defendant had no control." To the same effect are McDonough *v.* Third Ave. R. Co., 95 App. Div. 311, 88 N. Y. Supp. 609; Fanshaw *v.* Norfolk & Portsmouth Tr. Co. (Va.) 61 S. E. 790; O'Neil *v.* Lynn & B. R. Co., 180 Mass. 576, 62 N. E. 983; Ellinger *v.* Philadelphia R. Co., 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697; Gulf C. & S. R. Co. *v.* Phillips, 32 Tex. Civ. App. 238, 74 S. W. 793.

It was admitted that at the time of the accident the car was crowded, and that passengers were standing in the aisle. Appellants make complaint of the court's rulings and instructions upon this point, which were to the effect that the fact that the car was crowded with passengers would not entitle the plaintiffs to recover, and could not be considered by the jury, except as a part of the conditions existing at the time. The court's rulings and instructions in this regard were correct. The crowded state of the car was permitted to be shown as one of the conditions at the time of the accident. No negligence was alleged by plaintiffs because of the crowded condition of the car, and no causal connection between the crowded condition of the car and the accident was in any way shown. While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done. Stevenson *v.* S. P. Co., 102 Cal. 144, 34 Pac. 618, 36 Pac. 407; Smith *v.* Buttner, 90 Cal. 95, 27 Pac. 29. If appellants had desired to predicate negligence upon the crowded condition of the car they should have done so by appropriate allegation. But in this case, if they had done so, it is apparent that no different result would have been reached, since the overcrowded condition of the car was in no way the proximate cause of the accident, and it is but a matter of speculation as to whether or not the conductor, at the time actually engaged in taking up fares, would have seen the unauthorized act of the passenger who rang the starting bell if the car had not been crowded. A violation of the provisions of the Civil Code (Civ. Code, §§ 2102, 2184, 2185) will establish negligence, and where injury results from such negligence a recovery may be had. But in every case the particular negligence to avail plaintiff must have some direct and causal connection with the injury complained of. For example, it is negligence if the whistle of a locomotive engine is not sounded and its bell rung at crossings, but if the train were derailed by a misplaced switch, an injured passenger could not base his recovery upon the showing that somewhere along the journey the whistle had not been blown or the bell sounded when these things should have been done. In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury complained of. So, although the violation of such a statute is negligence per se, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleading and by the proof, or the action fails. Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117; Hendricks *v.* Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; McVay *v.* Brooklyn, etc., R. Co., 113 App. Div. 724, 99 N. Y. Supp. 266; Snyder *v.* Colorado Springs R. Co., 36 Colo. 288, 85 Pac. 686.

It was not error for the court to state, as it did, that the con-

ductor was doing his duty, or was in the performance of his duty, while collecting fares. Unquestionably, and as matter of law, the collection of fares and the issuance of transfers is a part of the duty of the conductor of a street car. It is, of course, equally his duty to look after the safety of his passengers while on the car and embarking and debarking therefrom. In this case it appears that the conductor was actually engaged in taking fares at the time the car stopped, and before giving his starting signal would have proceeded to the platform to see whether all intending passengers had left the car. But before he had done so the starting signal was given.

Answers to certain special questions which the court itself directed were upon matters not in dispute and established without contradiction. In this there was no invasion of the province of the jury. Baumann *v.* C. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

The court did not err in giving its instruction 4. The instruction, in hypothetical form, stated the uncontradicted facts of the accident, saying that: "If some passenger upon the rear of defendant's car, over whom the defendant had no control, gave the signal to start said car, and that the motorman in charge thereof responded to said signal and started his car," etc. It is argued against the instruction that it eliminates from the consideration of the jury the question as to whether the defendant, through its motorman and conductor, should have anticipated the unauthorized giving of the signal. But there is no word of testimony in support of this. The law is to the contrary of appellants' contention. "A carrier of passengers is not obliged to proceed to provide against casualities which have not been known to occur before, and which may not reasonably be anticipated. * * * That which never happened before, and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its happening and guarding against that remote contingency." Holt *v.* S. W. Mo. E. R. Co., 84 Mo. App. 443. Moreover, the jury specifically found that the motorman believed that the starting signal was given by the conductor.

No other points call for special attention.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; MELVIN, J.

TEEL *v.* COAL & COKE RY. CO.

(Supreme Court of Appeals of West Virginia, Nov. 23, 1909.)

[66 S. E. Rep. 470.]

Carriers—Injuries to Passengers—Assault by Servant.*—For willful injury, inflicted upon a passenger of a common carrier by a servant of the latter, under provocation, by the exercise of force or violence, not justified under the principles of the law of self-defense, the carrier is liable.

Carriers—Injuries to Passenger—Question for Jury.—Whether the circumstances warrant the force and violence used in such case, on the ground of real or apparent danger of death or great bodily harm, is a question for the ultimate determination of the jury, viewing the situation from the standpoint of the servant at the time, though he must decide it in the first instance at the peril of himself and his master.

Carriers—Injuries to Passenger—Instructions.—In an action for damages for an injury, so inflicted, an instruction, requested by the carrier, telling the jury they should find for the defendant, if they believed he exerted no more force than he deemed necessary, under the circumstances, is properly refused.

Assault and Battery—Defenses—Self-Defense.—The law of self-defense does not vary in the application thereof to felony, misdemeanor, and civil cases.

Appeal and Error—Harmless Error—Abstract Instruction.—It is not reversible error to give an instruction, correctly stating law applicable to the evidence adduced, though it is abstract in form and contains no express reference to the evidence.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by George Teel against the Coal & Coke Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Price, Smith, Spilman & Clay, for plaintiff in error.
W. W. Wertz and *C. J. Van Fleet,* for defendant in error.

POFFENBARGER, J. Complaining of a judgment against it for the sum of $1,000, in favor of George Teel, rendered by the circuit court of Kanawha county, the Coal & Coke Railway Company assigns errors, in respect to the giving and refusing of

*See foot-note of Birmingham Ry., etc., Co. *v.* Parker (Ala.), 34 R. R. R. 215, 57 Am. & Eng. R. Cas., N. S., 215; Yazoo & M. N. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54; second foot-note of Louisville Ry. Co. *v.* Kupper (Ky.), 32 R. R. R. 513, 55 Am. & Eng. R. Cas., N. S., 513.

instructions, rejection of evidence, and the overruling of a motion for a new trial.

The legal principles, applicable to the question of liability, and entering largely into the rulings of the court, complained of, have been thoroughly considered and stated in Ricketts *v.* Ches. & O. Ry. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901, and Gillingham *v.* Ohio River R. R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827, and need not be re-examined or restated here.

The cause of action, stated in the declaration, is personal injury, inflicted upon the plaintiff, while he was a passenger on the defendant's railroad, at the hands of one of its servants, a brakeman; it being alleged that this servant committed an assault and battery upon the plaintiff, maliciously and without any cause therefor, striking him violently, and crushing and bruising his face and breaking his nose. According to the evidence adduced by the plaintiff, he had given no cause for the attack made upon him. The brakeman had had an altercation with another passenger and was striking him, when the plaintiff arose from a seat on the opposite side of the aisle and protested, telling the brakeman not to hit the man any more, or something of that sort. At the time of the uttering of these words, he was standing rather behind the brakeman, and had not evinced any disposition to strike him or interfere otherwise than peaceably. Such is the testimony of the plaintiff himself and three other witnesses. This is directly contradicted by the testimony of about three witnesses introduced by the defendant. They say the plaintiff arose in a manner indicative of hostility, and either struck the brakeman, or laid his hand on his shoulder or neck. The first blow received by the plaintiff was inflicted on the nose with a pair of steel knuckles. This his assailant admitted in his testimony.

The court committed no error in respect to the exclusion of evidence. It refused to permit the witness Sturgeon, the conductor of the train, to answer several questions propounded to him, concerning the condition of the man with whom the brakeman had his first controversy, at the time thereof and afterwards. Whether the evidence, intended to be elicited by these questions, was relevant and material or not, there was no indication to the court as to what the witness would have said in response to the questions. Since the witness had already stated that both of the parties seemed to be intoxicated, and one of the questions related to intoxication on the part of the man first struck, we might infer intent to obtain further evidence of that kind; but we are utterly unable to perceive what the witness would have said in response to the unanswered questions. Hence it is impossible to say the defendant was deprived of anything of value to it or was prejudiced. Moreover, this witness and

others had already testified that both seemed to be intoxicated; the defendant had the benefit of the main fact, since it had already been laid before the jury; and these questions related to the condition of Mace, the man first struck, not Teel, and were therefore rather collateral to the main issue. In view of this, we think the court did not abuse its discretionary power in stopping the examination on the subject at this point, if it be conceded that a sufficient basis for an assignment of error was laid. "The court may, in the exercise of a sound discretion, interpose to put an end to an unnecessarily protracted examination of a witness, though such discretion should be exercised with considerable caution." 8 Ency. Pl. & Pr. 74, citing abundant authority.

The objection to instruction No. 1, given for the plaintiff, is alleged inapplicability to the facts proven. It is abstract in form only, not in substance. It states sound law, applicable to the case, but makes no express reference to the evidence. It is unskillfully drawn; but mere informality of an instruction is not ground for reversal. No jury, having heard this instruction read in the light of the evidence detailed to them, could have been misled by it. After stating the authority of employees to maintain order on passenger trains and of conductors as conservators of the peace, it said: "On the other hand, a railroad company is liable to a passenger on one of its trains for a willful and unlawful striking or beating of a passenger by brakeman employed in operating such train. Such an assault is a breach of the duty of protection which such company owes to its passengers."

No fault is found with instruction No. 2, stating the measure of damages hypothetically, except the use of the words "outrage and indignity" in giving the elements of the damages. This is a captious objection. The instruction seems to have been taken from one given in Ricketts *v.* Ches. & O. Ry. Co., containing these words. That instruction was held bad because it told the jury they could assess exemplary damages, interpreted by the court as meaning punitive damages; but no fault is found with that part of it which contained the words complained of. On the contrary, that portion of it was approved. This instruction relates to the quantum of damages, not the liability of the defendant. Its terms precluded the jury from considering it in any other light. Nor can it be said to assume the existence of facts calculated to inflame the jury, and so cause the imposition of excessive damages. At the time of the giving of the instruction, the court rightly assumed that willful, malicious, unprovoked beating in a public place, if found by the jury, would necessarily include the elements of outrage and indignity.

The court refused to give three instructions requested by the defendant, in the form in which they had been prepared, but

gave them after having modified them. The modification consisted of the insertion of the words "and had reasonable grounds to believe," after the words "as he believed," in that part of the instructions relating to the force which the servant could have used to protect himself and preserve order on the train. As prepared, the instructions would have authorized the jury to find for the defendant if, in their opinion, the servant had used such force as he believed was necessary under the circumstances. The modification narrowed the proposition, making the extent of rightful exercise of force depend upon actual and apparent necessity, not the brakeman's opinion, in that respect. This action of the court is questioned on the authority of Jackson *v.* Commonwealth, 96 Va. 107, 30 S. E. 452. The court, in that case, did approve an instruction, telling the jury the defendant has the right to repel an assault "by all the force he deemed necessary;" but we take it this was done inadvertently, since there is no discussion or analysis of this phase of the instruction. Likely its correctness was not argued in the briefs or seriously questioned, since there is nothing in the syllabus pertaining to it. At any rate, we do not think one who is assaulted may use such force, in repelling the attack, as he deems necessary, if he should deem it necessary to use more force than a jury would say is reasonable under the circumstances, viewing the situation from the standpoint of the assailant. Montgomery *v.* Commonwealth, 98 Va. 840, 36 S. E. 371, going to the other extreme, inaccurately says a man may rightfully use as much force as is necessary for the protection of his personal property, provided he does not endanger human life or do great bodily harm, since apparent, as well as actual, necessity justifies the exercise, and defines the limit, of force in repelling an attack. This court, in State *v.* Cain, 20 W. Va. 679, says the prisoner acts at his peril in determining the necessity of taking life, and leaves the ultimate determination of that question with the jury, saying the jury must pass upon his action in the premises. The rules of self-defense do not vary in their application to felony, misdemeanor, and civil cases. Railroad Co. *v.* Jopes, 142 U. S. 18, 26, 12 Sup. Ct. 109, 35 L. Ed. 919.

The court rejected defendant's instructions Nos. 4 and 5, apparently for the reason that they omitted the clause inserted in instructions Nos. 3, 8, and 9, by way of modification. For the reasons stated in the discussion of the action of the court in respect to said last-named instructions, we think the court did not err in refusing Nos. 4 and 5. Instruction No. 7 was also refused. This told the jury the defendant company was not liable if they should find that the brakeman struck the plaintiff because he interfered with the former in his attack upon the first man with whom he had his altercation; the plaintiff having no interest in said encounter, and not being under any obligation

to protect the other party. We know of no principle justifying the giving of this instruction, and none is stated in the brief. Surely a man is not justified in striking another with a deadly weapon, nor indeed at all, merely because he meddles in a controversy or encounter between other persons, to the extent of approaching and asking the prevailing party to desist. If it were so, the hazard, incident to peacemaking, and peaceable intervention from humane considerations, would be so great, and the consequences so irremediable, as to make it extremely unpopular and deter most men from undertaking it. The evidence afforded ample ground for the conclusion that the assault was wholly without provocation, and the instruction omits the element of legal provocation. Whether these instructions were fully justified as given we are not called upon to say, since they are not questioned in the brief filed by the defendant in error. Hence they are not to be considered as approved and made precedents for future cases. They may be more favorable to the defendant than the facts, as indicated by the defendant's evidence, warrant, since there is no pretense of the imminence of a deadly or malicious assault upon the defendant's servant at the time of his resort to the use of a deadly weapon. He justifies his use of it as a precaution against the possibility of his being whipped in the fight.

If the evidence adduced by the defendant would justify a verdict for it—a question we are not called upon to decide—the state of the evidence is such that the verdict could not properly be set aside. In respect to the matters, deemed material in the trial, the evidence conflicted directly and positively; the witnesses dividing into two classes, each of which stated the occurrence in a different way. This makes the case, in respect to these matters, turn all together upon the credibility of the witnesses, a fact exclusively within the province of the jury.

For the reasons stated, the judgment will be affirmed, with costs and damages according to law.

Affirmed.

PIERCE *v.* ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, April 11, 1910.)

[127 S. W. Rep. 707.]

Damages—Compensation—Mental Suffering—Right of Action.*—A passenger has no right of action for humiliation and mental suffering caused by the train auditor cursing and abusing him and threatening to eject him for boarding the train without a ticket on account of reaching it too late to purchase one, where the auditor finally accepted the cash fare tendered, and permitted him to continue to destination.

Appeal from Circuit Court, Drew County; H. W. Wells, Judge.

Action by M. V. Pierce against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Williamson & Williamson, for appellant.

W. E. Hemingway, E. B. Kinsworthy, E. A. Balton, and *Jas. H. Stevenson,* for appellee.

HART, J. On the 30th day of August, 1908, M. V. Pierce embarked on one of the passenger trains of the St. Louis, Iron Mountain & Southern Railway Company at Warren, Ark., for Monticello, Ark. When the train auditor came to him to take up his ticket, Pierce informed him that he had reached the station too late to purchase a ticket, and tendered his fare in money. The auditor at first refused to receive it, and cursed and abused Pierce in the presence of the other passengers, and threatened to eject him from the train. The conductor interfered, and the auditor then received his fare and permitted him to go to his destination, but continued to curse and abuse him. These facts were alleged by Pierce in a suit filed by him against the railway company to recover damages on account of the humiliation and mental suffereing occasioned him by the auditor's conduct. The railway company demurred to the complaint. The demurrer was sustained and the complaint was dismissed. Pierce has appealed to this court.

In the case of St. Louis, Iron Mountain & Southern Railway Company *v.* Taylor, 84 Ark. 42, 104 S. W. 551, the court held

*For the authorities in this series on the subject of the liability of a railroad company on account of insults by employees to passengers, see foot-note of Birmingham, Ry., etc., Co. *v.* Parker (Ala.), 34 R. R. R. 215, 57 Am. & Eng. R. Cas., N. S., 215; Yazoo & M. V. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54.

(quoting syllabus): "Mental suffering alone, unaccompanied by physical injury or any other element of recoverable damages, cannot be made the subject of an independent action against a carrier for damages, even where the act or violation of the duty complained of was willfully committed." The rule was approved and applied in the case of Chicago, Rock Island & Pacific Ry. Co. *v.* Moss, 89 Ark. 187, 116 S. W. 192.

Counsel for appellant recognizes the rule announced in these cases, but ask us to overrule it as being against the weight of authority and the better reasoning on the subject. The authorities bearing on the question were thoroughly considered and reviewed in the case of Railway Co. *v.* Taylor, *supra*, and no useful purpose can be served by again discussing the question. It is sufficient to say that the conclusion was reached in that case after a careful and deliberate consideration of the question, and no additional arguments are advanced for overruling these cases.

The judgment is therefore affirmed.

GUSTAFSON *v.* CEDAR RAPIDS & M. C. RY. CO.

(Supreme Court of Iowa, May 12, 1910.)

[126 N. W. Rep. 145.]

Carriers—Breach of Contract—Failure to Carry to Destination—Damages.—Where a street railroad passenger left the car because it was not going, as usual, to the end of the line, and was compelled to walk some distance, his remedy, if any, was for breach of contract, and he could not recover in the absence of evidence of damage.

Appeal and Error—Harmless Error—Failure to Allow Nominal Damages.—Failure to allow nominal damages to which one is entitled is not ground for reversal.

Appeal from District Court, Linn County; F. O. Ellison, Judge.

The plaintiff appeals. Affirmed.

Crosby & Fordyce, for appellant.
W. G. Clark and *W. E. Steele,* for appellee.

LADD, J. The Central Park line is one of defendant's street railways in Cedar Rapids. The plaintiff, with his wife, child, and sister-in-law, boarded a car at Fifth street and First avenue with the purpose of riding to E avenue and Sixteenth street, the end of the line near which he resided. He paid the fares of himself and those with him, but it does not appear how much this was. Upon reaching Sixteenth street, the car stopped, and plaintiff, noticing the conductor swinging the trolley around,

asked if the car was going no farther, and was informed that such was the order of the conductor. The plaintiff then inquired of the conductor if that was as far as he was going, and the latter said: "If you are going to the circus, why don't you go the other way?" Being told that plaintiff wished to go to the end of the line, the conductor answered: "That is the accommodation I will give you to-day." Asked to stop the car so that those with plaintiff might get off, the conductor did so, saying, "Go ahead and get them off." When plaintiff, after informing those with him, said that he would "see about this," the conductor responded, "Go ahead and see." According to the evidence in behalf of plaintiff, in making the last two remarks, the conductor appeared angry about something. The customary course of the car was along Sixteenth street to E avenue, five blocks farther, and plaintiff was compelled to walk this distance, carrying the child, as was also his wife and sister-in-law. The two latter assigned their claims for damages to him. Upon proof of the foregoing facts, a verdict was directed for the defendant.

It will be observed that the plaintiff and his assignors were not ejected from the car, nor even requested to leave it, so that Curtis *v.* Railway, 87 Iowa, 622, 54 N. W. 339, and Coine *v.* Railway, 123 Iowa, 458, 99 N. W. 134, relied upon by appellant, are not in point. They merely asked to be let off because the car was not going, as was usual, to the end of the line. The conductor complied with the request, and they alighted in safety. His conversation was not discourteous, even though he may have appeared angry, and nothing whatever occurred to occasion humiliation on their part. Possibly there was a breach of contract in failing to carry them to the end of the line, but, if so, no evidence of damage was adduced. Even if, upon such breach, nominal damages should be allowed, as contended by appellant, this would not be ground of reversal. See cases collected in Harvey *v.* Railway, 129 Iowa, 465, 482, 105 N. W. 958, 3 L. R. A. (N. S.) 973, 113 Am. St. Rep. 483. No right other than that to damages was involved, so that the cause is not within the rule of that decision.

There was no error.

Affirmed.

OWENS *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, May 4, 1910.)

[67 S. E. Rep. 993.]

Carriers—Injuries to Passenger—Punitive Damages—Question for Jury.*—In an action against a railroad company for personal injuries sustained in jumping from a moving train, where plaintiff had tendered his fare to M., a regular scheduled station, and the conductor had orders to stop and to take a siding there if he arrived later than a certain time, as he did, but though plaintiff urged that it be stopped, stating that his child was to be buried that afternoon, the train was not stopped, the plaintiff had the right to have the train stopped at M., and the extraordinary and unfeeling conduct of the conductor was some evidence of a willful, wanton, and reckless disregard of plaintiff's rights sufficient to be submitted to the jury on the question of punitive damages.

Carriers—Injuries to Passenger—Following Advice of Trainmen—Negligence—Imputation of.†—Passengers are in many cases excused from the imputation of negligence where they obey the direction or advice of the trainmen, whom the passenger may justly suppose, by reason of their experience, to be better able to judge whether a given act is dangerous than the passenger himself.

Appeal from Superior Court, Anson County; W. J. Adams, Judge.

Action by W. T. Owens against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

These issues were submitted: "(1) Did the defendant wrongfully refuse to stop its train at McFarland to permit the plaintiff to alight therefrom, as alleged in the complaint? Ans. Yes.

"(2) Was the plaintiff injured through the negligence of the defendant, as alleged in the complaint? Ans. Yes.

"(3) Did the plaintiff by his own negligence contribute to his injuries? Ans. No.

*For the authorities in this series on the subject of the right to recover punitive damages for wrongs to passengers, see first foot-note of Yazoo & M. V. R. Co. *v.* Fitzgerald (Miss.), 34 R. R. R. 58, 57 Am. & Eng. R. Cas., N. S., 58; foot-note of Cincinnati, etc., Ry. Co. *v.* Strosnider (Ky.), 33 R. R. R. 235, 56 Am. & Eng. R. Cas., N. S., 235.

†For the authorities in this series on the question whether it is contributory negligence to alight from a moving train or street car at the direction or invitation of an employee of the carrier, see foot-note of Holden *v.* Great Northern Ry. Co. (Minn.), 27 R. R. R. 675, 50 Am. & Eng. R. Cas., N. S., 675, where all those preceding it are collected; extensive note, 32 R. R. R. 786, 55 Am. & Eng. R. Cas., N. S., 786.

"(4) Did the defendant willfully and wantonly refuse to stop its train at McFarland to permit the plaintiff to alight therefrom? Ans. Yes.

"(5) What damages, if any, is plaintiff entitled to recover? Ans. $2,500."

From the judgment rendered the defendant appealed.

James A. Lockhart and *McLean & McLean,* for appellant.
Robinson & Caudle, for appellee.

BROWN, J. This case was before us at a former term upon a demurrer ore tenus to the complaint, and is reported in 147 N. C. 357, 61 S. E. 198, which is referred to as to its general nature. The superior court sustained the demurrer, and upon appeal this court reversed the judgment, holding that, upon the allegations of the complaint, the plaintiff was entitled to nominal damages. Thereafter, by leave of the lower court, an amended complaint was filed, to which the defendant filed an answer. The defendant excepted to the submission of the second and fourth issues. Under the allegations of the amended complaint, it was proper to submit those issues, as they were clearly raised by the amended pleadings. We have examined the 25 assignments of error set out in the record, but do not deem it necessary to discuss them seriatim.

1. The defendant requested the court to instruct the jury that the plaintiff can recover only nominal damages. The court declined, and defendant excepted. The case presented upon the amended pleadings and the evidence is essentially different from that presented upon the demurrer. The evidence tends to prove that the plaintiff had tendered his fare to McFarland, a regular scheduled station on the defendant's road; that he informed the conductor that his child was dead, and would be buried that afternoon, and repeatedly begged the conductor to stop there. It is in evidence that the conductor had orders to stop at McFarland, and take the siding in case he arrived later than 1:20 p. m.; that the conductor examined his watch when he neared McFarland, and said it was 1:22 p. m. Nevertheless he did not stop, although repeatedly urged by the plaintiff to do so. The plaintiff had a right to have the train stop at McFarland in obedience to orders, and under the unusual and painful circumstances of this case the extraordinary and unfeeling conduct of the conductor is some evidence of a willful, wanton, and reckless disregard of the plaintiff's rights sufficient to be submitted to the jury in connection with the question of punitive damages.

2. It is further contended by the defendant that in any view of the evidence the plaintiff is guilty of such contributory negligence as bars recovery. We are not disposed to relax the just and reasonable rule laid down in the former opinion in this case, and quoted from the opinion in Johnson *v.* Railroad, 130 N. C.

488, 41 S. E. 794, but there are facts and circumstances in evidence which we think warranted the judge below in submitting the matter under proper instructions to the jury. It must be admitted that the temptation to alight from a moving train to reach the body of a beloved child is very great, almost irresistible. Yet that would not have excused the plaintiff. But there are facts and circumstances in evidence that the conductor had not only slowed the train down very much at McFarland, but that he invited and encouraged the plaintiff to jump, and that, just as the plaintiff was about to jump with his hand hold of the rail, the train started up more rapidly and threw him to the ground. It is generally recognized that passengers are in many cases excused from the imputation of negligence where they obey the directions or advice of the trainmen, whom the passenger may justly suppose, by reason of their experience, to be better able to judge whether a given act is dangerous than the passenger himself. Thompson on Neg. § 2879; Johnson *v.* Railroad, 130 N. C. 490, 41 S. E. 794. The charge of the court below upon this feature of the case was a clear statement of the law as settled by repeated decisions. Submitting the question of the plaintiff's negligence to the jury, instead of imputing negligence to him as matter of law upon his own negligence, we think was not erroneous under the evidence in this record.

Upon a careful review of the whole case, we are of opinion that no substantial error was committed, certainly none that warrants another trial.

No error.

JACKSON *v.* DETROIT & M. RY. CO.

(Supreme Court of Michigan, April 1, 1910.)

[125 N. W. Rep. 763.]

Railroads—Operation of Trains—Death of Switchman—Negligence—Question for Jury.—In an action for the death of a switchman by being struck by defendant's engine, while running backward at night without light or warning, on a track near the switch of another road which decedent was operating, where there is evidence to support plaintiff's theory that decedent had a right to assume that defendant's train crew would operate its train on the occasion in question in their accustomed manner, and that decedent would receive warning of the approaching train, it was proper to submit the case to the jury on the question of fact and law.

Master and Servant—Fellow Servants.*—A switchman employed in the yard of one railroad company is not a fellow servant of the train crew of another road operating its trains through the same yard.

Appeal and Error—Review—Harmless Error—Rulings as to Evidence.—The sustaining of an objection to a question, if error, is harmless where the question was answered.

Appeal and Error—Harmless Error—Rulings as to Evidence.—The overruling of an objection to an improper question is harmless, where the answer is favorable to the party objecting.

Railroads—Operation of Trains—Action for Death of Switchman—Evidence.—In an action against a railroad company for the death of a switchman of another road, by backing its train through the yards in the nighttime without light or warning, evidence is admissible to show the distance between defendant's train and a person operating the switch, though there is no claim that the switch was too close to the track.

Appeal and Error—Review—Harmless Error—Striking Out Evidence.—The striking out of competent evidence is harmless, where the fact sought to be shown thereby was fully covered by other evidence.

Error to Circuit Court, Bay County; Chester L. Collins, Judge.

Action by Ida Jackson, as administratrix of Oscar F. Jackson, deceased, against the Detroit & Mackinac Railway Company. Plaintiff had judgment, and defendant brings error. Affirmed.

Argued before MONTGOMERY, C. J., and OSTRANDER, HOOKER, BLAIR, and STONE, JJ.

*For the authorities in this series on the question whether the employees of different masters may be fellow servants, see second footnote of Floody *v.* Chicago, etc., Ry. Co. (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., 133.

James McNamara (*Weadock & Duffy*, of counsel), for appellant.

Devere Hall, for appellee.

MONTGOMERY, C. J. The plaintiff's decedent, Oscar F. Jackson, was employed by the Pere Marquette Railroad Company in Bay City, Mich., as night yardmaster. The defendant's passenger trains were operated over the tracks of the Pere Marquette Company from the station called "Foss," about a mile from the passenger station of the Pere Marquette Company, into which station defendant's passenger trains came. Decedent's employment as such yardmaster extended over a period of eight years prior to his death. As yardmaster, decedent had full charge and direction of the movements of all trains, engines, and cars owned or operated by the Pere Marquette Company, and in defendant's brief it is stated that he had charge of those operated by defendant company. But this statement should be taken with limitations. He had nothing to do with the actual operation of the Detroit & Mackinac trains. All he had to do in connection with the trains was to cut off the sleeper, and this was done, because, as stated by a witness, "it then became a Pere Marquette sleeper. In order to give through traffic from the north and carry passengers to Detroit, they would take off the Pere Marquette sleeper and not make the passengers get out." He had nothing to do with the Detroit & Mackinac operators or operatives in doing that. He used his own labor, and the Detroit & Mackinac in no way assisted.

On the evening of June 15, 1908, while the decedent was engaged in throwing a switch to permit the passage of a Pere Marquette train and standing at the switch between the track of the Pere Marquette and the defendant's track, the defendant's crew, in charge of its engine, backing out without outlook or headlight, on the track next to the switch where decedent was standing, and where, in operating the switch, his person would be brought within striking distance of the engine, came into collision with decedent, and he was killed. The testimony tended to show that the practice and custom of the defendant company and its crew was to have an outlook and lights, and that it was the neglect adherence to this custom which caused the death of plaintiff's intestate.

At the close of the testimony, a motion was made to direct a verdict for the defendant, and it is strenuously argued in this court that there is no legitimate evidence to sustain the plaintiff's case. We are all agreed, however, that there was sufficient evidence sustaining the plaintiff's theory to carry the case to the jury if that theory is correct as a matter of law.

The plaintiff's theory is that decedent had a right to assume that this work would be conducted by this train crew in the man-

ner in which it had been accustomed to, and that he would receive the warning that had been customary, as defendant's crew knew that decedent's work would require his taking the position which he took on this occasion. The case in this respect presents very much the same questions that were involved in Fitzpatrick *v.* Michigan Central Railroad Company, 149 Mich. 194, 112 N. W. 915, and Shall *v.* Detroit & Mackinac Railway Company, 152 Mich. 463, 116 N. W. 432. We think no error was committed in submitting the case to the jury upon the question of fact and law. Nor can it be maintained that the decedent and the defendant's trainmen were fellow servants. See cases above cited and Kastl *v.* Wabash Railroad Co., 114 Mich. 53, 72 N. W. 28.

Numerous errors are assigned upon the admission and rejection of testimony. The first discussed is the refusal of the court to permit the defendant on cross-examination of the witness Tierney to go into the subject of the character of the house he kept. An examination of the record discloses, however, that the question which was propounded was answered. We think no harm resulted from the ruling.

Thomas Kennedy, the engineer of defendant's engine, was sworn as a witness for the defendant, and testified as to the standard rules in force governing the company. On recross-examination he was asked: "Q. Does not Pere Marquette rule 102 say that trains must not be backed over nor across, nor cars cut from an engine or train and run over, a public or highway crossing, unless there is a man on the leading car who at night must display a light? A. Yes, sir." He was then asked: "Q. Isn't there the same danger in running an engine back over a crossing at night that there would be in pushing a car over the crossing at night?" This was objected to by defendant. The answer was permitted, and the witness testified: "A. The forward end of the car would be much further away from the engineer and fireman than the rear of the engine." While we think the examination might well have been omitted, still we cannot see how harm was done, as the answer given was favorable to defendant.

The next assignment of error discussed was on the cross-examination of Kennedy. As already stated, the decedent was injured while standing between the two tracks of the Pere Marquette and the defendant, operating the switch. The evidence showed that when bending over to turn the switch his body would be about eight or nine inches from the east rail of the track, or so close that the defendant's engine passing along the track would strike him. Upon cross-examination Engineer Kennedy stated that the tender of his engine at the rear projected over the rails about 29 inches, and that the step on the side of the tender projected about 4 inches farther, so that there would

be but seven inches between the switch stand and the step. He was then asked: "Q. As you went by? That would not be room for a man to stand and operate the switch, would it? A. No, sir." After the answer was taken, it was objected to as incompetent, irrelevant, and immaterial. It was urged in the objection that there was no claim made that the switch was too close to the track. We think this testimony was entirely competent. It was not necessary to aver that the switch was too close to the track. It was a part of the surroundings, and bore upon the question of whether the defendant was prudent in failing to keep a lookout or light, and warning the operator at the switch. It was one of the risks that the train crew of the defendant knew was likely to be encountered. It was competent to show the exact situation. The negligence charged was not the location of the switch, but the operation of the engine.

The witness Wilkin, for the defendant, testified, in answer to the question: "Where would Mr. Jackson be with reference to the ground that you would go over on engine 23? A. He was perfectly safe." This answer was stricken out on motion of plaintiff. We think no error was committed. The answer stated a conclusion, and, even though competent, this ground had been fully covered by a description to the jury of the precise position in which Mr. Jackson stood, so that the only office left for this answer to fill was to furnish the witness' opinion as to the safety of the position occupied by Mr. Jackson.

Error is also assigned upon the decision of the court overruling the motion for a new trial made upon the ground that the verdict was against the weight of the testimony. Without reviewing the testimony at length, we are agreed that the case is not so clear for the defendant as to justify the court in substituting our judgment for that of the circuit judge upon the question of whether a new trial should be granted. There was a clear question of fact for the jury.

The case was properly submitted, and the judgment will be affirmed.

HUNT *v.* PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, Feb. 21, 1910.)

[76 Atl. Rep. 13.]

Master and Servant—Injuries to Servant—Existence of Relationship—Use of Tracks of Railroad Company—"Quasi Employee."*—Where defendant railroad company was rightfully using the tracks of plaintiff's employer, another railroad company, the plaintiff is not a "quasi employee" of defendant company, within Act April 4, 1868 (P. L. 58), providing that, when any person shall be injured while employed about the premises of a railroad company of which he is not an employee, the right of action shall be such only as would exist if he were an employee.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Howard A. Hunt against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Wm. Clarke Mason, for appellant.
Thomas Leaming and *John R. K. Scott,* for appellee.

MESTREZAT, J. This action was tried before a jury, and resulted in a verdict for the plaintiff. The trial judge refused binding instructions for the defendant company; but the court in banc, on motion of counsel, subsequently entered judgment for the defendant under the act of April 22, 1905 (P. L. 286). The plaintiff appealed, and assigned as error the granting of defendant's motion for judgment non obstante veredicto. The judgment was reversed by this court, and the trial court was directed to enter judgment upon the verdict. Hunt *v.* Philadelphia & Reading Railway Co., 224 Pa. 604, 73 Atl. 968. The judgment having been entered below as directed by this court, the defendant has taken this appeal, and assigns for error the action of the court in declining to charge that "under all the evidence in this case your verdict must be for the defendant." It will therefore be observed that on the former appeal taken by the

*For the authorities in this series on the question whether the employee of another master may also be the employee of a railroad company, see last paragraph of foot-note of Hendrickson *v.* Wisconsin Cent. Ry. Co. (Wis.), 33 R. R. R. 340, 56 Am. & Eng. R. Cas., N. S., 340; fifth foot-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; Floody *v.* Chicago, etc., Ry. Co. (Minn.), 34 R. R. R. 133, 57 Am. & Eng. R. Cas., N. S., 133.

plaintiff we held that under the evidence the case was for the jury; and we are now asked to say, on this appeal taken by the defendant company, that the case was not for the jury, and that the court should have directed a verdict for the defendant company.

After a reargument, and further consideration, we are not convinced that our former judgment is erroneous. We did not discuss the effect of the act of April 4, 1868 (P. L. 58), in the opinion filed in the former case, as under our cases we regarded the question too clear to need discussion. That act provides that, "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads * * * and premises of a railroad company, * * * of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee." It appears from the evidence that the defendant company was using the tracks of the Baltimore & Ohio Railroad Company, and presumptively by the latter's permission, and hence, at the time and place of the accident, they must be considered the property of the defendant. The plaintiff, an employee of the Baltimore & Ohio Railroad Company and then engaged in its service, was, therefore, not employed on or about the defendant's road, and was not a quasi employee of the defendant company, within contemplation of the act of 1868. The facts of the case bring this branch of it within the doctrine of Kelly *v.* Union Traction Co., 199 Pa. 322, 49 Atl. 70, and Keck *v.* Philadelphia & Reading R. R. Co., 206 Pa. 501, 56 Atl. 47.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. *v.* FOREMAN et al.

(Circuit Court of Appeals, Eighth Circuit, November 5, 1909.)

[174 Fed. Rep. 377.]

Death—Action for Wrongful Death—Parties—Arkansas Statute.—Mansf. Dig. Ark. 1884, § 5226 (Ind. T. Ann. St. 1899, § 3431), in force in Indian Territory prior to its admission as a state, gives a right of action for wrongful death where there are no personal representations to the heirs at law of the deceased person, and provides that the amount recovered shall be for the exclusive benefit of the widow and next of kin, "and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall

deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." Held, that while, under such statute, there can be no recovery unless pecuniary loss is shown to the widow or next of kin, where a person killed left as his only heirs at law under the statute his wife and mother, the mother was a necessary party plaintiff, even though she may not have individually sustained any pecuniary loss through his death.

Master and Servant—Master's Liability for Injury to Servant—Evidence of Negligence.*—The fact of an accident in which a railroad employee is injured carries with it no presumption of negligence on the part of the company; but, in order to render it liable, some specific act of negligence must be affirmatively shown.

Master and Servant—Master's Liability for Injury to Servant—Defective Railroad Cars.—A freight train on defendant's railroad broke in two by the pulling out of a drawhead of the car next the engine, which was stopped about ten feet from the car while the engineer, plaintiff's intestate, who was conductor, and a brakeman, were making a temporary attachment. While so at work, the engine moved back, and deceased was caught between it and the car and killed. Plaintiffs alleged two acts of negligence on the part of defendant: A defective air brake, which permitted the engine to move; and a leaky throttle. But it appeared that the engine moved upgrade, and it was not shown that the lever was so set that it would move backward if started by the steam. The fireman was on the engine. Held, that in the absence of some evidence to show what in fact caused the engine to move, and that it was due to some act of negligence on the part of defendant, it could not be held liable.

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by Mary K. Foreman and Mary E. Foreman against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Clifford L. Jackson, for plaintiff in error.
D. H. Wilson and *A. A. Osgood,* for defendants in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This action was brought to recover damages for a death alleged to have occurred by reason of the

*For the authorities in this series on the subject of plaintiff's burden of proof in an action against a master for the death of or injury to his servant, see last foot-note of Chamberlain *v.* Southern Ry. Co. (Ala.), 34 R. R. R. 655, 57 Am. & Eng. R. Cas., N. S., 655; fourth head-note of Christensen *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; Louisville & N. R. Co. *v.* Caldwell (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560.

negligent, wrongful acts of the railway company. The facts are:

Deceased was a freight conductor in the employ of defendant, engaged in running a freight train south on defendant's line of road from Parsons, Kan., to Muskogee, Okl. On the 5th day of August, 1903, when the train, composed of 12 to 15 ballast cars, had passed Russell Creek station, and when about seven telegraph poles north of milepost No. 419 on defendant's line of road, the drawhead in the car next to the engine pulled out. At this time the crew in charge of the train consisted of deceased, as conductor, Miller, as engineer, Searcy, fireman, Wyman, head, and Denham, rear brakeman. Passenger train No. 4 was about due at this place, as was a freight train against which this train had a time order, which facts rendered it necessary for the crew in charge of the train to act quickly and promptly in moving the train. When the drawhead pulled out, the engineer applied the brakes, stopped the engine, threw the reverse lever in the center of the quadrant as nearly as possible, got down from the engine, leaving it standing some eight or ten feet in front of the car from which the drawhead had been pulled out, and leaving the fireman in the cab on the engine. After ascertaining in what the trouble consisted, the engineer went back to the engine, procured a chain with which to fasten the train to the engine in place of the broken drawhead. As deceased, engineer Miller, and front brakeman Wyman, were working between the rails chaining the car and engine together, the deceased being at the time on his knees assisting in passing the chain around the front axle of the car, from some cause the engine backed up, catching the deceased between the drawbar of the engine and the deadwood timbers of the car, from the effect of which his head was crushed, resulting in immediate death.

To recover damages for loss so sustained, this action was brought by the widow and next of kin, and the mother of deceased, jointly, against the railway company. The specific grounds of negligence charged in the petition are these:

"That the backing of said engine was the result of its being out of repair and in an unsafe and dangerous condition, in this, that the air brake and appliances controlling the same were out of order and leaky so that after being set the air brake would leak off and allow said engine to start and move; and in this, that the throttle of said engine was out of order and leaked steam to such an extent as to cause the engine to move after the steam valve had been closed so far as it could be closed in the condition it then was in, by reason whereof said engine No. 490 was, and for several days before that had been, unsafe and dangerous to use in and about the handling and operating of a train of cars—all to the knowledge of said defendant."

While many errors are assigned and discussed, in the view we have taken of the case, we deem it necessary to notice but two: (1) The action of the trial court in denying the request made by defendant for an instructed verdict in favor of defendant and against the mother, Mary E. Foreman; (2) the refusal of the trial court to direct the jury, on the entire case, to return a verdict in favor of the defendant. And of these in their order. Was the mother of deceased a proper or necessary party plaintiff to this action?

It being the insistence of plaintiff in error in this regard, as deceased was contributing nothing toward the support of his mother at the date of his death, and had contributed nothing for 15 years last past, she had no reasonable prospect of receiving any aid or support from deceased in the future, therefore she suffered no pecuniary loss by reason of his death, and no recovery can be had in her behalf and the request to so charge the jury should have been sustained.

The solution of this question depends upon a consideration of the act creating the cause of action. That act is section 5226, Mansf. Dig. Laws Ark. 1884 (Ind. T. Ann. St. 1899, § 3431), extended over the Indian country by Act Cong. May 2, 1890, c. 182, 26 Stat. 81, and reads as follows:

"Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, that every such action shall be commenced within two years after the death of such person."

At the common law no right of action accrued to any one for an injury resulting in death. It was therefore the province of the legislative branch of the government, state or national, to create such right of action, to confer it on such persons, to limit the recovery to such amount, and to distribute it to such persons under such limitations as in its wisdom seemed proper. The right of action created by this statute is conferred first on the personal representatives of the deceased. If, as in this case, there were no personal representatives in existence, then the right of action may be exercised "by the heirs at law of such deceased person for the exclusive benefit of the widow and next

of kin." There is in this statute no thought of punishment of the wrongdoer, and the recovery is limited to a just compensation for loss sustained by those for whose benefit the action is brought, and is to be distributed to the widow and next of kin in the same proportion and the same manner as the law distributes personal property left by the deceased. Therefore, in order to ascertain on whom the law casts the right of action so created, we have only to determine who the heirs at law of the deceased were at the date of his death, and, in order to determine the amount of recovery, to ascertain what the pecuniary loss to the widow and next of kin was by reason of the death. For, if no such loss was sustained by those to whom the law would distribute the recovery when had, it is clear, in such case, there could be no recovery. Swift & Co. *v.* Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Little Rock & Ft. Smith Ry. *v.* Townsend, 41 Ark. 382; Fordyce *v.* McCants, 51 Ark. 509, 11 S. W. 694, 4 L. R. A. 296, 14 Am. St. Rep. 69; St. Louis, M. & S. E. Ry. Co. *v.* Garner, 76 Ark. 555, 89 S. W. 550; Atchison, etc., Co. *v.* Brown, 26 Kan. 443.

Section 2592, Mansf. Dig. Laws Ark. 1884 (Ind. T. Ann. St. 1899, § 1880), in force in the Indian country when this death occurred, provides as follows:

"If a husband die leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which said husband died seised, and one-half of the personal estate, absolutely and in her own right."

Section 2522 of the same laws (Ind. T. Ann. St. 1899, § 1820), in force, reads as follows:

"When any person shall die having title to any real estate of inheritance or personal estate not disposed of nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: First, to children or their descendants in equal parts. Second, if there be no children, then to the father, then to the mother; if there be no mother, then to the brothers and sisters or their descendants in equal parts."

From which it becomes apparent in this instance both the widow and the mother of the deceased, who died without children or father living, were his heirs at law; and as the right of action here created, in the absence of personal representatives, is cast upon the heirs at law of the deceased, no others can exercise such right. The right of action so created must be exercised by those on whom it is conferred, the heirs at law; the amount recovered to be distributed when recovered to those for whose benefit the cause of action was created, the widow and next of kin. As the mother is one of the heirs at law of

deceased, and as the heirs at law alone, in the absence of personal representatives, may exercise the right to prosecute this action, the mother is a necessary party plaintiff, notwithstanding she may in her individual capacity have suffered no pecuniary loss by reason of the death of her son, and may in her individual capacity receive no part of any recovery that may be had. She acts here in the capacity of plaintiff in the exercise of this right created by statute, not in her individual capacity as mother of deceased, but in her representative capacity as one of his heirs at law. And she acts not for her individual benefit, but for the benefit of the widow and next of kin. In other words, the right to prosecute the action created by this statute, where none existed at the common law, is conferred upon and must be exercised by those acting in a representative, and not in an individual, capacity, and presumably to the end that the cause of action created might not fail for want of those in esse qualified to prosecute.

In refusing the request preferred by defendant to instruct a verdict against the mother, Mary E. Foreman, and in favor of the defendant, there was no error, if there was evidence sufficient to warrant the jury in returning a verdict against the defendant in favor of plaintiffs.

We shall therefore proceed to a consideration of the remaining question.

This being an action to recover damages for a loss sustained by the death of deceased, husband and son, by reason of the alleged wrongful and negligent acts of defendant, it was incumbent upon plaintiffs, before such recovery could be had, to both allege and prove, not only the cause which operated to produce the death, but, also, that such cause had its origin in some specific and particular negligent act of the defendant, for the result of which it was legally liable.

As said by Mr. Justice Brewer, delivering the opinion of the court in Patton *v.* Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361:

"First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (Stokes *v.* Saltonstall, 13 Pet. 181, 10 L. Ed. 115; Railroad Company *v.* Pollard, 22 Wall. 341, 22 L. Ed. 877; Gleeson *v.* Virginia Midland Railroad, 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & Pacific Rail-

way *v.* Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this case the fact that the engine, left by the engineer standing some eight or ten feet in front of the car from which the drawhead had been pulled out, did back up quietly while deceased and others were between the rails fastening a chain to the axle of the car, and did in so backing up catch and kill deceased, is known to and admitted by all; but the question presented for determination is: What force operated to move the engine backward, and how was such force applied? Before plaintiffs could be permitted to recover, they must have alleged in what this moving force consisted, and that it was applied because of some negligent act committed by defendant for which it was legally liable to plaintiffs.

As has been seen, plaintiffs charge in their petition such negligent act to have been committed by defendant in one of two ways: Either that defendant negligently permitted the air brakes and appliances to be and remain out of order and in a leaky condition, which caused the brakes to release and the engine to move backward; or that the throttle of the engine was out of order and leaked steam to such an extent as to move the engine backward.

If the efficient cause of the engine's backward movement originated in any act of the engineer himself, or of the fireman who remained on the engine, or in any other person, act, manner, or thing than those acts of negligence charged, plaintiffs may not recover, and it devolves upon the plaintiffs to establish one or both of the negligent acts charged against defendant was the efficient cause of the moving of the engine to the exclusion of all others.

The question now presented is: Did plaintiffs sustain the burden undertaken by them of producing evidence from which the jury was warranted in finding either or both acts of negligence charged was the efficient and proximate cause of the en-

gine moving to the death of deceased? In other words, the evidence found in the record must return an answer to the question, what caused the engine to move? And that answer, when returned, must find either the one or the other, or both, of the negligent acts of defendant charged to exist as a fact, and such finding must be supported by the evidence, or the judgment entered may not stand.

Coming now to a consideration of the evidence as bearing on the question presented, well-known and conceded physical facts must be considered and applied. There is in the record no contradiction of the fact that from milepost No. 419 on defendant's line of road for a distance of ten telegraph poles to the north the grade is an upgrade, the place where the accident occurred was about seven telegraph poles north of milepost 419, the engine in question was running south, downgrade, at the place where the drawhead was pulled out, and the engine was stopped and left by the engineer when he went to assist in chaining the front car of the train to the engine. Suppose, then, it should be found to be true, as charged by plaintiffs, that the air brakes and appliances were out of repair and leaked air sufficient to release the brakes from the engine. What, in the very reason and nature of things, must have happened when the engine, by the force of its own weight, moved? In compliance with natural laws it must have moved downward and from the train, and not upward and toward it.

Again, it is true, there is evidence in the record that the engine in question on the day of the accident leaked steam at the throttle; but the extent of such leakage is not shown, more than that the engine moved. It is argued, however, from these premises, as the engine did leak steam at the throttle, and as it did move backward, it will be presumed the engine must have leaked steam to such an extent as to show the railway company negligent or it would not have moved backward. This, however, is simply reasoning in a circle without established premises or necessarily correct conclusion, and for this reason: The presumption is that defendant furnished an engine reasonably suitable for the work to be performed by it, with appliances in a reasonably safe condition for use; that is to say, it was not negligent in this regard. This presumption must be overcome by evidence before a recovery can be had on this ground.

Again, the process of reasoning here employed is faulty and illogical, in that it bases the presumption of negligence on a presumption and not on an admitted or established fact; whereas, a presumption of fact must be based on a known or established fact, and can never be founded on another presumption. United States *v.* Ross, 92 U. S. 281, 23 L. Ed. 707; Manning *v.* Insurance Co., 100 U. S. 693, 25 L. Ed. 761; Looney *v.* Metropolitan Railroad Co., 200 U. S. 480, 26 Sup.

Ct. 303, 50 L. Ed. 564; United States, etc., Co. *v.* Des Moines National Bank, 145 Fed. 273, 74 C. C. A. 553. In Douglass *v.* Mitchell's Ex'rs, 35 Pa. 443, Mr. Justice Thompson stated the rule as follows:

"That as proof of a fact the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are, ascertained by just inferences. Not so with a mere presumption of fact. No presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn."

See, also: Phila. City Pass. Railway Co. *v.* Henrice, 92 Pa. 434, 37 Am. Rep. 699; Railway Co. *v.* Rhoades, 64 Kan. 553, 68 Pac. 58.

Again, it is further shown by the same evidence that all locomotive engines when in use leak steam to a greater or less extent at the throttle. Therefore, if this be true, the mere showing that this engine did leak steam at the throttle, without any showing of the extent, would not support the charge made. The fact is, it cannot be determined from the evidence in this case what caused the engine to move. All the witnesses testifying in the case having any actual knowledge of the condition of the engine at the time of the accident said it was in good condition. The engineer in charge of the engine, as a witness for plaintiffs, testified he set the brakes on the engine, threw the reverse lever, which controls the movements of the engine backward and forward, in the center of the quadrant on which it moves. The evidence further discloses when this lever is in the exact center of the quadrant the application of steam at the throttle will move it in neither direction. When forward of the center, upon the application of steam, the engine will move forward; or, if backward from the center, the engine will move backward. He further testified it is the duty of the engineer in stopping and leaving his engine to place the reverse lever in the center of the quadrant and set the brakes on the engine, and that he did this. As has been seen, if the air leaked, releasing the brakes, and the engine moved from its own weight, it would have moved forward not backward. If it moved from an application of steam to the cylinder through leaky valves, the reverse lever was not left at the center of the quadrant, but must have been left in reverse motion. However, there is no evidence in this record of the fact that the lever was left in reverse motion. The contrary appears from plaintiffs' own testimony. And if the engineer, contrary to his express testimony, negligently left the lever in reverse motion, there can be no recovery in this case for two reasons: (1) Defendant, as a matter of law, is not liable for such negligence in this case;

(2) as such negligence is not charged, defendant was not required to meet it at the trial.

The evidence further disclosed the regular engineer in charge of engine No. 490 was Guy Danforth. That on the day preceding the accident this engine, in charge of Danforth, pulling an empty freight north, took the passing track at Oswego station. That the train was separated at a street crossing running east and west across the passing track to allow vehicles to pass. North of this street, attached to the engine, were some 16 to 18 cars. After the engine, with these cars attached, had been run north to clear the street crossing, had been stopped, and the engineer had climbed down from his engine, the engine with the cars backed up almost closing the gap made between the parts of the train at the street crossing. As shown from the record, this fact was given much weight by the trial court in refusing the request to instruct for defendant. However, Engineer Danforth testified, in regard to this transaction: That he left the engine in the reverse motion; that he released the air brakes in order to take up the slack of the train, and neglected to open the cylinder cocks and thus relieve the pressure in the cylinder heads, which started the engine in the act of backing up; that it was his fault, and not any defect of the engine, that caused it to back up on this occasion. It also appears that the passing track at this place was level or slightly downgrade to the south, from all of which we are of the opinion the conditions present on the 4th of August, the day preceding the accident in this case, were so different in character as to throw no light on the situation out of which the death of deceased arose.

Considering all the evidence found in the record, and giving to it all just inferences derivable therefrom, in our judgment, it was impossible for the jury to determine what caused the engine to move to the destruction of Foreman. Therefore the verdict returned is not supported by sufficient evidence, and the court, in the exercise of sound discretion, should have granted the request to instruct a verdict for defendant. Patton *v.* Texas & Pacific Ry. Co., supra, and cases cited.

It follows the judgment must be reversed, and the case remanded for a new trial.

It is so ordered.

HEILIG *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 4, 1910.)

[67 S. E. Rep. 1009.]

Appeal and Error—Review of Nonsuit.—On appeal from a judgment of nonsuit, the evidence must be construed most favorably to plaintiff, and every material fact which it tends to prove must be taken as established.

Appeal and Error—Findings—Conclusiveness—Weight and Credibility.—The Supreme Court will not pass on the weight of the evidence or the credibility of witnesses.

Master and Servant—Master's Duty—Methods of Work—Customary Methods—Knowledge.*—Where a railroad company permitted its employees to ride on its engine between certain stations in the discharge of their duties for nine years without objection, it is charged with knowledge of their custom in doing so.

Master and Servant—Master's Duty—Care Required.—Where railroad employees had customarily ridden on the engine between certain stations in the discharge of their duties for such a length of time as to charge the company with notice of such custom, it was bound to use reasonable care to transport them safely while riding in such position.

Master and Servant—Master's Duty—Protecting Railway Employees.*—Where a railroad company permitted its employees to ride on its engine and the steps thereof without objection for nine years, it could not permit obstructions along the track so close to passing engines as to endanger employees in such position, if it installed larger engines than those used when coal chutes along the track were built so that employees on the steps of such larger engines were liable to be struck by the coal chute posts, it was bound to move the posts out of the way, or not to use such engines on that track.

Master and Servant—Injuries to Trainmen—Contributory Negligence—Alighting from Moving Train.†—The general rule that persons injured while attempting to get off a moving train cannot recover for such injuries does not apply with strictness to an employee, injured while attempting to get off an engine on the steps of which he was riding, according to the custom of employees, by being struck by a coal chute post belonging to the company which was too close to the track.

*For the authorities in this series on the subject of the duties and liabilities of a railroad company, as an employee, with respect to objects or structures over or near railroad tracks, see fourth paragraph of second foot-note of Thomas *v.* Wisconsin Cent. Ry. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., S., 609.

†See foot-note of Reeves *v.* North Carolina R. Co. (N. Car.), 33 R. R. R. 382, 56 Am. & Eng. R. Cas., N. S., 382; third foot-note of Vail-

Heilig *v.* Southern Ry. Co

Master and Servant—Scope of Employment.‡—Where a railroad floating gang employee was directed to return from a place to which he was sent in the discharge of his duties upon one of defendant's engines, as was customary, he was still engaged in the scope of his employment in his employer's business in returning on the engine, so that it owed him the duty of safety transporting him back.

Appeal from Superior Court, Cabarrus County; Webb, Judge.

Action by Lurin Heilig against the Southern Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

At the conclusion of plaintiff's evidence, defendant moved for judgment as of nonsuit. Motion allowed. Plaintiff excepted and appealed to this court. This action was brought to recover damages for injuries received by plaintiff while in the service of defendant, the plaintiff alleging specifically the negligent acts of defendant resulting in his injury; the defendant denying any negligence, and pleading the contributory negligence of the plaintiff. The evidence offered by plaintiff tended to show that, at the time of his injury and for eight months prior thereto, he was in the employ of the defendant at its shops at Spencer, N. C.; that he belonged to the floating gang, under the control and orders of Capt. Howell, his foreman and "bossman"; that he was to obey his orders and do what he directed; that on the afternoon plaintiff was hurt, July 12, 1902, he was ordered by Capt. Howell to go to Salisbury to help unload a supply car; that this was about 6 p. m.; that, when the car was unloaded, the engine on which he rode from Spencer to Salisbury had returned; that in a short time he caught another engine going to Spencer; that Capt. Howell instructed him to come back on an engine; that it was the custom, and had been for nine years, for the employees to ride back and forth, from Spencer to Salisbury, on defendant's engines; that plaintiff got on the steps on the engine, in sight of the engineer, only about two feet from him; that plaintiff was dressed as an

lancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

‡For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to their employees who are injured while being transported to and from their work, see first foot-note of Kunza *v.* Chicago, etc., Ry. Co. (Wis.), 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347.

For the authorities in this series on the question what acts are, and are not, within the scope of employment of a railroad employee, see last foot-note of Kunza *v.* Chicago, etc., Ry. Co. (Wis.), 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347; last paragraph of foot-note of Yazoo & M. V. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54.

employee of defendant; that he was standing on the steps of the engine close to the cab; that he did not go in the cab because the engineer did not allow negroes in the cab; that it was the custom of defendant's employees to ride on the steps of its engines; that as he was riding down to Spencer, the night being dark, the engineer suddenly and rapidly ran his engine by a curved cross over to a side track running next to a coal chute, not the usual track for engines running from Salisbury to roundhouse; the engine was a very large passenger engine, and it passed within a few inches of the posts supporting the coal chute, almost touching the last one; these posts had been stationed about nine years before the accident, and before defendant had begun to use engines as wide as the engine on which plaintiff was riding, and as he passed one of the posts, perhaps the first post, plaintiff was struck by the post and knocked to the ground, the tender running over his left foot, rendering amputation necessary. It appeared that for some time prior to the injury, an apron over the pier or post had been knocked off and the post jerked out some three or four inches. This had been reported to the defendant. From the place where the plaintiff was found, it is probable this post struck him. The darkness of the night prevented plaintiff from seeing the posts, and he did not know their exact location or that one had been jerked nearer the track. Several witnesses were examined, among them Capt. Howell, whose testimony corroborated plaintiff's statement.

Montgomery & Crowell, for appellant.
L. C. Caldwell, for appellee.

MANNING, J. (after stating the facts as above). This appeal being taken from the judgment of nonsuit entered on defendant's motion made at the close of plaintiff's evidence, it is well settled by the decisions of this court that the evidence "must be construed in the view most favorable to the plaintiff, and every fact which it tends to prove, and which is an essential ingredient of the cause of action, must be taken as established, as the jury, if the case had been submitted to them, might have found the facts from the testimony." Freeman *v.* Brown, 151 N. C. 111, 65 S. E. 743; Morton *v.* Lumber Co. (at this term) 67 S. E. 67, and cases cited. The recital of the evidence will be sufficient to show that the case ought to have been submitted to the jury. It is not our duty to determine its weight, or to pass upon the credibility of the witnesses. It appears from the evidence that it had been the custom for nine years of the employees of defendant to ride on its engine passing from Salisbury to Spencer, and that no objection was made to this by the defendant; that it was customary for them to ride on the steps of the engine or anywhere else thereon, where "they would not be

crowded off by others;" the distance was only two or three miles, and the usual track taken by the engines was not the one next to the coal chute. We held in Farris *v.* R. R., 151 N. C. 483, 66 S. E. 457, that the defendant is charged with knowledge of a custom of its employees in crossing its tracks, where the custom had existed as long as six months. Likewise, it must be held charged with knowledge of a custom of its employees to ride on its engines running from Salisbury to Spencer, in the discharge of their duties, where such a custom is shown to have existed for nine years without the slightest protest or objection. As the defendant has, therefore, permitted this custom to become established among its employees, it is clear that the defendant owed them the duty to use due and reasonable care to transport them in safety. It cannot permit obstacles to exist so close to the tracks traversed by such engines as to endanger the life and limb of its employees using its engines in accordance with a custom so long established. The hazard to employees riding on the engines traversing the track nearest the coal chute having been increased by the greater width of the engine, it became the duty of the defendant to move back from the track the piers or posts supporting the coal chute, which increased the peril to its employees, or to discontinue the use of that track for such engines. If plaintiff had begun to alight from the engine, the rule that persons injured by alighting from a moving train cannot recover for injuries received does not apply in this case with absolute strictness. Reeves *v.* Railroad, 151 N. C. 318, 66 S. E. 133. The evidence that this plaintiff was so injured does not clearly appear; he says that he had put one foot on the stirrup of the engine preparatory to alighting, when he was struck and knocked off.

In Texas & Pacific Ry. Co. *v.* Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, a case similar to this in the particulars of injury received by the appellee, the court held: "Knowledge of the increased hazard resulting from the negligent proximity to a railroad track of a structure will not be imputed to an employee, using ordinary diligence to avoid it if properly located, because he was aware of its existence and general location. It is for the jury to determine from all the evidence whether he had actual notice." The plaintiff in the present case testified that he was looking ahead, but on account of the darkness he could not see the post which struck him, and did not know of its dangerous proximity to a passing engine. In returning from Salisbury, where he had been directed to go in the discharge of his duties and in returning in the manner he was directed to return, and as it was the custom of the employees to return, the master—the defendant—owed him the same duty as it did to provide a safe way for transporting him to Salisbury from Spencer, and in so returning he was doing

the work directed by his superior to be done. He was still the servant engaged in his master's business and in the scope of his employment. The duty of the master under such conditions has been so frequently stated that it has become elementary. In our opinion the case ought to have been submitted to the jury, and, in allowing the motion of nonsuit, there was error, for which a new trial is ordered.

New trial.

WABASH R. CO. *v.* UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit, June 23, 1909.)

[172 Fed. Rep. 864.]

Railroads—Safety Appliance Act—Couplers on Engines.—A locomotive engine used in interstate commerce need not necessarily have automatic couplers at both ends to comply with safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), where one end only is coupled and in tended to be coupled to other cars.

Railroads—Safety Appliance Act—Construction—Diligence to Comply with Act.—The requirement of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), that all cars used in moving interstate traffic shall be equipped with automatic couplers coupling by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, is absolute; and it is no defense to an action against a railroad company for its violation by using cars on which the couplers were so out of repair as to necessitate men going between the cars to operate the same that the company used due diligence to keep the couplers in good repair.

In Error to the District Court of the United States for the Eastern District of Illinois.

The writ of error is to reverse a judgment entered in favor of the United States for one hundred dollars upon each of four counts of a declaration charging violations of section 2 of the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]). The specific act of violation charged in the first count is that the coupling and uncoupling apparatus on the "B" end of a certain locomotive engine, and in the second, third and fourth counts respectively, that the coupling and uncoupling apparatus on the "B" end of each of three certain freight cars, all used by plaintiff in error on its line of railroad in the movement of interstate traffic, were out of repair and inoperative to an extent that necessitated men engaged in the coupling and uncoupling of these cars, going between the

respective ends of the locomotive and cars in question and those to which they were attached in performance of their duty. The further facts are stated in the opinion.

Edward C. Kramer, for plaintiff in error.
W. E. Trautman and *George A. Crow,* for the United States.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Two questions are raised by the assignments of error that we deem it necessary to dispose of; first, and relating to the conviction on the first count only, was the plaintiff in error entitled to show that the coupling on the B end of the engine was not intended to be used, and, secondly, whether in complying with the provisions of the Safety Appliance Act, proof of a high degree of care and diligence to keep its coupling apparatus in good repair, as required by the Act, would relieve it from liability under the Act as against mere proof by the Government that the couplers were not in fact in good working order at a given time during the course of an interstate journey.

(1) The first question is raised by the following instruction, offered and refused:

"That if the jury believe from the evidence that the engine No. 516 had originally been equipped with automatic couplers at both the A end and the B end, but that at the time alleged in the first count of the plaintiff's declaration, the lock chain had been disconnected, and the knuckle removed from the coupler at the B end and that thereby the said coupler at the B end of said engine was placed in such a condition that no other car could be coupled to the engine at such B end or uncoupled therefrom either by going between the cars or not, and that the coupler at the A end of such engine was in good condition and that the said coupler at the A end of said engine was the only one used by defendant at the time in question in moving interstate traffic, then the defendant is not liable for the condition of the said coupler at the B end of said engine and you should find the defendant not guilty as to the first count of plaintiff's declaration,"

—and by evidence, excluded by the Court, tending to prove that the coupling on the B end of the engine was not intended to be used—that such coupler had been disconnected and the knuckle taken out, in pursuance of a purpose that it should not be used.

The argument of the Government may be reduced to this syllogism: The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] amended by Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]) requires that every "car" used in moving inter-

state traffic shall be equipped with "couplers" coupling automatically with impact; the Supreme Court has held in Johnson *v.* Southern Pacific Company, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that a locomotive engine is a car within the meaning of the statute; therefore, locomotive engines must be equipped with "couplers," and inasmuch as "couplers" means more than one coupler, and if more than a coupler on the tender is used the other must be used on the B end of the engine, therefore, an engine unequipped with a coupler at its B end, in accordance with the requirements of the Act, is a violation of the Act.

The difficulty with this reasoning is, first, in the assumption that under the doctrine of the Johnson Case a locomotive and a car are synonymous terms in every respect and for every purpose—a rigidity of construction that the Supreme Court never intended; and the second difficulty is in the assumption that, because couplers, in the statute, is in the plural, there can be no car without a coupler at each end, irrespective of the use to which such car is put. As was said by the Supreme Court in the Johnson Case, the primary object of the act was to promote the public welfare by securing the safety of employees and travelers. Its design to give relief was more dominant than to inflict punishment—a view of the statute that is wholly irreconcilable with a construction that would require the designated couplers to be placed where they were never used or intended to be used.

(2) The second question is raised by the following instruction to the jury, to which exception was duly entered:

"The testimony of the defendant's witnesses was admitted here as to the inspection of those cars, for the purpose of tending to show as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep those cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This Statute is commanding, and requires the defendant at its peril to keep these couplers in such condition so that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find," —supported by evidence tending to show that the plaintiff in error had used diligence and care to keep the cars in a reasonably safe condition.

Since this case was brought here and the briefs filed, this question has been disposed of against the contentions of the plaintiff in error in the case of St. Louis, Iron Mountain &

Southern Ry. *v.* Taylor, Administratrix, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

The judgment entered upon the first count of the declaration is hereby reversed. The judgment entered upon the remaining counts is affirmed, and the case is remanded to the District Court with instructions to modify accordingly.

HOUSE *v.* SOUTHERN RY. CO.

(Supreme Court of North Carolina, April 27, 1910.)

[67 S. E. Rep. 981.]

Master and Servant—Safe Place for Work—Appliances.*—The rule requiring the master to provide a reasonably safe place for work and reasonably safe and suitable appliances does not as a rule apply to the use of ordinary, everyday tools, nor to ordinary conditions requiring no special care or preparation, where the defects are readily observable, and where there was no good reason to suppose that injury would result.

Negligence—Personal Injury—"Proximate Cause."†—"Proximate cause" has been defined as the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury.

Master and Servant—Injuries to Servant—Appliances.—Defendant railroad was not liable for injuries to a servant whose hand, while

*For the authorities on the subject of the duty of a master to furnish safe appliances and tools, see foot-note of Hill *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 672, 57 Am. & Eng. R. Cas., N. S., 672; first foot-note of St. Louis S. W. Ry. Co. *v.* Lewis (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

For the authorities in this series on the subject of the duty of a master to furnish an employee a safe work place, see first foot-note of St. Louis S. W. R. Co. *v.* Lewis (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; second foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353; last head-note of McConnell *v.* Pennsylvania R. Co. (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84.

†For the authorities in this series on the question, what is and is not, the proximate cause of an injury, see last foot-note of Brown *v.* Chesapeake & O. Ry. Co. (Ky.), 34 R. R. R. 714, 57 Am. & Eng. R. Cas., N. S., 714; second head-note of Craig *v.* Great Northern Ry. Co. (Wash.), 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675; last head-note of St. Louis, etc., Ry. Co. *v.* Pollock (Ark.), 34 R. R. R. 240, 57 Am. & Eng. R. Cas., N. S., 240; fourth foot-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; last head-note of Bloom *v.* Sioux City Traction Co. (Iowa), 33 R. R. R. 784, 56 Am. & Eng. R. Cas., N. S., 784; fourteenth head-note of Cleveland, etc., Ry. Co. *v.* Powers (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563.

she was attempting in the performance of her duties as car cleaner to raise a car window which had become fast and the pull of which was worn smooth, slipped and went through the glass; the appliance being a simple one, and the injury one not ordinarily likely to happen.

Appeal from Superior Court, Iredell County; Long, Judge.

Action by Ella House against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Civil action tried at November term, 1909, of the superior court of Iredell county.

On issues submitted the jury rendered the following verdict:

"First. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"Second. Did the plaintiff by her own negligence contribute to her own injury? Answer: No.

"Third. What damages, if any, has the plaintiff sustained? Answer: $700."

Motion to dismiss as on judgment of nonsuit formally entered and renewed at close of entire testimony, motion denied, and defendant excepted. Judgment on verdict for plaintiff, and defendant excepted and appealed.

L. C. Caldwell, for appellant.

G. W. Garland and *Armfield & Turner,* for appellee.

HOKE, J. The plaintiff set forth her cause of action in the complaint as follows:

"Second. That on the ——— day of December, 1906, the plaintiff was in the employ of the defendant as a servant at Salisbury, and engaged in cleaning passenger coaches of the defendant for a valuable consideration. That on the aforesaid day of December, 1906, while the plaintiff was at work, as aforesaid, in the performance of her duties upon a car belonging to the defendant, she was ordered and directed by the defendant to raise the windows of the car, one of which had just been repaired by the defendant, but had been repaired in such a negligent manner that, when plaintiff attempted to raise the said window, the defendant had carelessly permitted it to become so fastened and tight that, when she undertook to raise it, she had to exert an unusual amount of force, and in doing so her hand slipped and went through the window pane, breaking the glass and cutting her arm and hand, whereby she was made to suffer mental agony, bodily pain, and was permanently injured.

"Third. That the pull provided by the defendant, which it was necessary for the plaintiff to use in raising said window, had become worn smooth and unsafe for the purpose for which it was provided, thereby causing plaintiff's hand to more easily

slip when it became necessary for her to exert unusual force in raising the said window."

And offered evidence tending to sustain it; and on this statement the court is of opinion that the motion to dismiss as on judgment of nonsuit should have been allowed.

We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in Hicks *v.* Manufacturing Co., 138 N. C. 319-325, 50 S. E. 703, 705, and other cases of like import, the principle more usually obtains in the case of "machinery more or less complicated and more especially when driven by mechanical power;" and does not as a rule apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation, or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result.

The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking. Defined in some of the decisions as "the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury." Brewster *v.* Elizabeth City, 137 N. C. 392, 49 S. E. 885. These windows not infrequently become tightened from different causes; and, while it may be a great inconvenience and should perhaps be given more attention than it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and therefore no actionable wrong has been established.

Our decisions on this subject are also against the plaintiff. Dunn *v.* Railroad, 151 N. C. 313, 66 S. E. 134; Lassiter *v.* Railroad, 150 N. C. 483, 64 S. E. 202. In Dunn's Case plaintiff was injured by an ordinary sledge hammer flying from the helve just as a co-employee, in the line of his duty, was in the act of striking with it, and the court held: "When in the ordinary and everyday use of a tool, simple in structure, an injury is caused an employee by a defect in it, which was not observed by him after working with it for several hours, the employer is not liable in damages by reason of the defect alone; and, when an injury was thus caused to the plaintiff by the unexpected flying off of a striking hammer used by another in striking a riveting hammer held by him while riveting bands together in the course of his employment, the employer is not responsible in damages for plaintiff's resultant injury."

There was error in refusing defendant's motion for *nonsuit*, and same must be reversed.

Reversed.

CHESAPEAKE & O. RY. CO. *v.* NASH.

(Court of Appeals of Kentucky, Nov. 24, 1909.)

[122 S. W. Rep. 509.]

Master and Servant—Injuries to Servant—Negligence.—Where a carpenter force was employed by a railroad company to go from place to place on the road, and lived in camp cars while en route, the engineer, in charge of an engine and cars detached from the camp cars, while at a station en route to a place where carpenter work was to be done, could reasonably anticipate that some one in the camp cars would be moving about, or proceeding from car to car, and that the shock of coupling under such circumstances might cause injury; and a member of the force was not negligent as matter of law in attempting to go from one car to another at such time, especially where he knew that the engine and cars had been detached, if he received no warning that they were approaching.

Master and Servant—Injuries to Servant—Negligence of Master.* —The engineer in charge of the detached engine and cars owed the duty under the circumstances of giving warning of the return of the engine to couple, and the ringing of the bell, being the warning ordinarily given in such cases, was the only warning to which the occupants of the camp cars were entitled, and it was not necessary to blow the whistle or send to the camp cars to inform the occupants that the engine was returning.

Appeal from Circuit Court, Campbell County.

Action by John R. Nash against the Chesapeake & Ohio Railway Company and others. Judgment for plaintiff against the defendant named, which appeals. Reversed, and remanded for new trial.

Worthington, Cochran & Browning and *Galvin & Galvin,* for appellant.

George Doniphan and *James C. Wright,* for appellee.

CLAY, C. Appellee, John R. Nash, instituted this action against appellant, Chesapeake & Ohio Railway Company, John T. Dwyer, and Albert A. King to recover damages for personal injuries. The jury found for Dwyer and King, but returned a verdict in appellee's favor for $10,000 against the railroad company, and from the judgment based thereon the latter appeals.

*For the authorities in this series on the subject of the duty of a master to warn and instruct his servants, see last foot-note of Arkansas Midland Ry. Co. *v.* Worden (Ark.), 32 R. R. R. 106, 55 Am. & Eng. R. Cas., N. S., 106; second foot-note of St. Louis, etc., Ry. Co. *v.* Jamison (Ark.), 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677; Arkansas Cent. R. Co. *v.* Workman (Ark.), 31 R. R. R. 300, 54 Am. & Eng. R. Cas., N. S., 300.

The facts of the case are as follows: In the month of January, 1907, there was a washout on the line of appellant's railway between Glenn Park and Melbourne, in Campbell county, Ky. On the morning of January 23, 1907, a freight train, consisting of an engine and eight cars, in charge of Albert A. King, conductor, left K. C. Junction, Covington, Ky., for the point of the washout. At Newport, Ky., the train picked up six camp cars, containing the road carpenter force; appellee Nash being one of the force. The train next stopped at Dayton, Ky., and laid a hand car on a flat car and got the balance of the men. About two miles east of Dayton, at a point called D. N. Cabin, the train again stopped and picked up 50 or 60 laborers. It then proceeded to a station called Brent. Here the engine and some of the cars were uncoupled for the purpose of doing some switching, and the conductor went to the telegraph office to receive orders. The engine and cars engaged in the switching went ahead about 65 car lengths, and the camp cars were left standing upon the main line. At the time of the accident appellee was in one of these cars. After completing the work of switching, the engine, with two or three material cars, returned for the purpose of securing the camp cars, which had been left on the main line, and then proceeding to the train's destination. The camp cars were used to carry the force of carpenters from place to place on appellant's road, for the purpose of doing such repair work as might be necessary. These cars were ordinary box freight cars, with doors in each end. One of them was known as the "kitchen car." The carpenters made their home in these camp cars while being transported from point to point on the railroad. There were no platforms at either end, and in passing from one car to another it was necessary to step over the coupling apparatus. At the time of the accident, appellee had been in appellant's employ for some three or four months. He was boarded and transported from place to place in the camp cars. He was paid by appellant for the time taken in carrying him the same as if he were actually at work. Appellee knew that the train had stopped at Brent on the main line, and that the engine and a few cars had left the balance of the cars standing thereon. He also knew that they had not reached their destination, and that the engine had to return and get the camp cars before they proceeded on their way. Just before the accident the appellee passed from one car to another and got a pair of gum boots. He then started a second time for the kitchen car, for what purpose does not appear. While walking to the end of the car, and when very near to the door, the engine was backed up and against the train. The shock caused him to be thrown forward. He caught the jamb of the open door, and his body was swung out. His head was caught between two cars, and he was seriously and permanently injured. Appellant's witnesses testify that the bell

on the engine was being rung as the engine approached the camp cars. On the other hand, appellee and others, who were in position to hear, testified that they did not hear the ringing of the bell.

It is first insisted by appellant that the court erred in failing to give a peremptory instruction in its favor. In this connection it is argued that it was not shown that any rule of the company required those in charge of the engine and cars under such circumstances to give warning of their approach. This may be true; but negligence does not always depend upon whether a rule of the company has or has not been violated. Sometimes the company's rules may require a greater or less degree of care than the law requires. So the company may be negligent in certain respects, where there is no rule covering such a case. But it is contended that the company had a right to presume that appellee and others on the camp cars were in a place of safety, and was not required to anticipate that any one of them would be in a position so dangerous that the ordinary coupling of a car, without great force or violence, would injure any one. Then, too, it is further claimed that appellee was himself guilty of contributory negligence in placing himself in a position of danger when he had reason to believe that the engine and the cars thereto attached would return and get the camp cars. In discussing these questions it must be borne in mind that the appellee and other members of the carpenter force were making their home in the camp cars. That they would move about in the cars was not an unreasonable expectation. That being the case, we cannot say, as a matter of law, that appellee was guilty of contributory negligence in attempting to go from one car to another, especially in view of the fact that he knew that the engine and cars had been detached from the camp cars, and claims to have received no warning that they were then approaching. Our conclusion is that the engineer and conductor in charge of the engine and detached cars could reasonably anticipate that some one in the camp cars would be moving about, or proceeding from one car to the other, and that the shock of coupling under such circumstances might cause injury. It follows, therefore, that the probability of injury was such as to impose upon the company the duty of giving warning of the return of the engine. The case was, therefore, one for the jury, and the court did not err in refusing to award appellant a peremptory instruction.

The court in its instructions authorized a recovery by appellee if the railway company, by its agents and servants in charge of the locomotive and train of cars, at the time and place described in the proof, without timely warning and with negligence, moved its locomotive so that it came against the cars at a time when appellee was rightfully upon one of said cars and exercising ordinary care for his own safety. Thus the court left to the jury

to determine what was a timely warning. The ringing of the bell, however, in our opinion, was sufficient warning, under the circumstances of this case. Had the engine whistled, it would not have apprised appellee of the fact that the engine, with the detached cars, was then returning for the purpose of coupling. Nor do we think it was necessary for the conductor or engineer to send some one to the camp cars to inform those occupying them that the engine was returning. While it is true that appellee and others engaged in a similar work were not like ordinary trainmen, in that they were required to be on the lookout for the return of the engine, yet they knew they had not reached their destination, and that the engine would return. In view of the position those on the camp cars thus occupied, it seems to us that the only warning to which they were entitled was the one ordinarily used for that purpose, to wit, the ringing of the bell. Upon the next trial, the court, in addition to the instructions given, will instruct the jury to the effect that the timely ringing of the bell as the train came back was a timely warning of the approach of the engine, within the meaning of the first instruction.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

WELLINGTON *v.* PELLETIER.

(Circuit Court of Appeals, First Circuit, November 16, 1909.)

[173 Fed. Rep. 908.]

Appeal and Error—Review—Reception of Evidence.—The rule applied that, under the federal practice, a party who relies on a general objection to evidence must show that the defects in the evidence admitted, which are relied on, could not have been cured by the party offering it, if his attention had been called to them.

Master and Servant—Injury to Servant—Contributory Negligence—Duty to Observe and Avoid Danger.—Plaintiff's decedent, while at work making a trench between the rails of a private spur track which led from a railroad siding to defendant's quarry, was struck and killed by a car which had been standing with others on the siding, but, being insufficiently blocked, started and ran downgrade upon the spur track. Held, that the circumstances were not such as to make the rule applicable which requires unusual care and vigilance on the part of persons on railroad tracks where trains are frequently passing, and that deceased was not chargeable with contributory negligence because he did not keep a constant lookout, and that the circumstances are analogous to those cases requiring the employer to furnish a safe place for working.

Wellington *v.* Pelletier

Master and Servant—Injury to Servant—Proximate Cause of Injury—Intervening Cause.—Where cars were negligently left standing on a side track at the top of a grade by defendants' employees without being secured, except by the setting of the brakes, and one of such cars ran down upon and killed plaintiff's intestate, the fact that the brake was released by children playing about the cars did not constitute such an intervening cause as would prevent defendant's negligence from being the efficient proximate cause of the injury.

Master and Servant—Negligence of Superintendent under Massachusetts Statute.—The question whether a person temporarily in charge of defendant's business was one whose principal duty was that of superintendence, so as to render defendant liable for injury to another employee through his negligence under the Massachusetts employer's liability statute, held properly submitted to the jury.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Emma M. Pelletier against Authur J. Wellington. Judgment for plaintiff, and defendant brings error. Affirmed.

Olcott O. Partridge and *H. Eugene Bolles* (*Henry M. Channing,* on the brief), for plaintiff in error.
William A. Pew, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This suit was brought by the administratrix of the estate of George Pelletier against Wellington, who was operating a quarry, with a verdict for the plaintiff. Wellington owned a spur track which led from a side track of the Boston & Maine Railroad. This side track and the spur track were on a grade. The side track was used for storing empty cars to be loaded in connection with Wellington's business. These cars were left by the Boston & Maine Railroad near the head of the grade on its own siding; and when Wellington or his employees desired cars they were accustomed to select them as needed, and run them down to his spur track. They were ordinarily left near the head of the grade by the railroad corporation with the brakes set, and with a tie across the track blocking the wheels. If the cars were left by the Boston & Maine Railroad on its siding in an unsafe condition with reference to starting down the grade, the fault was with it. So long as the cars remained at that point without any disturbance of the status in which they were left there by the Boston & Maine Railroad, Wellington was, of course, not at fault. It is claimed that, in connection with the injury to the deceased, Wellington's employees ran one or more cars down the grade, and left the remaining cars with their brakes set, without any block-

ing of the wheels, and that thereupon the boys playing about the cars, and who were accustomed to play about them, in some way started them, and caused them to run down the grade and kill Pelletier. Pelletier was in the employ of Wellington, and at the time was working between the rails of Wellington's spur track, excavating a trench. He appears to have had no connection with the handling of the cars, at least none at the essential time involved here. There was no evidence that he was looking at the cars, or otherwise watching for a possibility of their running down the grade. The verdict was for the plaintiff, and thereupon Wellington brought this writ of error.

There were a number of minor exceptions taken at the trial, only one of which has been urged upon our attention. This suit being for the negligence of defendant's superintendent, or rather of one who was temporarily acting as superintendent, the statute requires a notice; and it is now urged on us that the notice was not sufficient under the law. The objection to the admission of this notice was only general, which is insufficient to base an exception on under the circumstances of the case, because non constat, if the objection had been specific, it might not have been met by the plaintiff on the spot. Under the federal practice, whoever relies on a general exception must point out that the defects in the evidence admitted could not have been cured by the party offering it, if his attention had been called to those relied on.

Passing by these propositions, the alleged errors are based very largely, if not entirely, on questions of fact which we will deal with quite summarily, because no prejudice can come in any future case from thus dealing with them.

It appears in the record that, when the cars were left by the Boston & Maine Railroad, they were chained to the track. There is no claim that, when any of the cars were taken away as we have described, Wellington's employees replaced the chain with reference to the cars remaining. We pass by this because, under the circumstances, it is clear that the jury could not have been properly instructed to the effect that a mere omission to replace the ties was not a negligent act, as the appellant claims they should have been. This is one of the class of facts within the province of the jury, supported in this case by the almost universal custom to protect railroad cars left near the head of a grade, as these cars were, by something more than merely setting up the brakes.

It is claimed that there was no evidence that the tie was not replaced; but on this point the record stands as follows: Three men went up to bring down the cars. One of them came down with the last car, leaving the two to secure those that remained. One of these men testified that he did not put the tie back, and he added that he had no business to put it back. No one told

him to do so. The other one, who was called by the defendant, testified generally, with reference to all the cars, that the tie was put back. He testified that he and the first witness, to whom we have referred, went to the last car which went down the grade, and that one of them handled the tie; but he admitted he did not know whether he did it himself, or the other person we have named. Under the circumstances, we are not only of the opinion that we would not be justified in reversing the finding of the jury on that point, but that, on the other hand, its conclusion was correct.

It is maintained that the deceased was not in the exercise of due care, and there is some discussion with reference to the question of the burden of proof under the Massachusetts statute on which this suit is based. The ground of this objection is that the deceased was an able-bodied, experienced workman, in full possession of his faculties, familiar with his surroundings, and knew that the cars were stored on the side track above described, that his view was not obstructed, and that he could easily see in each direction. But this is not the case of either a main track or a siding on which trains were regularly or frequently run, or even run at all, so far as the record shows. It shows only the circumstances which we have stated, circumstances to which the duty of listening and looking, so frequently concerned in accidents resulting from the movement of railroad trains proper, has never been applied. This duty relates to circumstances where persons may be in known danger, although every other person does his full part according to law or custom. It does not necessarily apply to the ordinary conditions of work where no danger is customarily expected, provided others than the one injured have used due care. In other words, there is no rule which requires a universal duty of looking and listening under the ordinary circumstances of performing labor, and thus at all times incumbering and delaying its performance. This case is rather of the class where the person held in fault is required to secure the person injured a safe place for working, as a consignee unloading a car. Wright *v.* The Railway, L. R. 10 Q. B. 298, affirmed 1 Q. B. 252 (1876); Mullins *v.* Railroad Co., 201 Mass. 38, 87 N. E. 476.

It is claimed that the interposition of the boys in this case was the interposition of a new efficient cause, which, if interposed, the law says eliminates the orginal cause. On the other hand, it has been thoroughly understood, since the leading case of Scott *v.* Shepherd, 2 W. Bl. 892, well known as the "Squib Case," that the interposition even of human beings, acting under circumstances which deprive them of periods for reflection, or known to be of classes which are ordinarily governed by unreasoning impluses, does not come within the class of responsible interventions referred to. This is illustrated in one direction

by the squib case, and in the other direction by the well-known cases where young children, either through carelessness or inattention, have been intrusted with dangerous weapons. The general principle is sufficiently discussed in Pollock's Law of Torts (8th Eng. Ed.) 45 et seq. The rule on which the plaintiff relies in this respect was authoritatively stated and applied by the Court of Appeal in 1896 in Engelhart *v.* Farrant, [1897] 1 Q. B. 240. Oddly enough, in McDowall *v.* Great Western Railway Company (in the Court of Appeal in 1902) 2 Q. B. [1903] 331, the circumstances with reference to cars and boys were strictly like those at bar and the case was distinguished solely on the point that the jury expressly found that the defendant was not at fault. Therefore, of course, there was no operative negligence which could be either an immediate or a remote cause of the accident.

After all, the only close point in the case is on the question of superintendence. The intestate and the man through whose negligence the tie was not replaced were coemployees. The usual superintendent was absent. Of course, evidence of a much less striking character may be required to prove the characteristics of one exercising superintendence temporarily under the Massachusetts statutes than those of the usual superintendent. We went into the law regarding this question of superintendence sufficiently in Canney *v.* Walkeine, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33, decided June 14, 1901, and in Munroe *v.* Ley, 156 Fed. 468, 84 C. C. A. 278, decided October 22, 1907. We need in this case to add nothing to what is there stated by us. It is not at all improbable that, if we had been the jury, instead of the appellate court, we might have found on the facts otherwise than was found. Nevertheless, the charge of the presiding judge was very full and clear, and called the attention of the jury carefully and correctly to all phases of the facts, which were multifarious; and, taken altogether, the condition is such that we cannot lawfully interfere with the result.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

GREAT NORTHERN RY. CO. *v.* MCDERMID.

(Circuit Court of Appeals, Ninth Circuit, February 7, 1910.)

[177 Fed. Rep. 105.]

Master and Servant—Master's Liability for Injury to Servant—Defective Machinery—Questions for Jury.*—Where a servant having knowledge of a defect in a machine or appliance which makes it unsafe to use it reports the fact to the employer, and is promised that the defect shall be repaired within a reasonable time, whether his continuing to use it is within the assumption of risk or constitutes contributory negligence if he is injured are questions for the jury, unless the facts are such that upon any view of them no recovery can be had thereon as matter of law.

Master and Servant—Master's Liability for Injury to Servant—Construction of Rules of Railroad Company.—If a rule of a railroad company is ambiguous and uncertain, it should be construed most strongly against the company, and in favor of the employee.

Master and Servant—Master's Liability for Injury to Servant—Defective Machinery—Contributory Negligence—Violation of Rules—Reliance on Promise to Repair.*—Where the rules of a railroad company required the roundhouse foreman to make all needed repairs on engines or cause them to be made, a rule requiring engineers before starting on a trip to examine their engines to know that they are in a safe condition to operate does not make it the duty of an engineer to make repairs before starting, but in such respect the roundhouse foreman is his superior, and the promise by such foreman to repair a defect reported to him by an engineer, or to send an appliance required, may justify the engineer in proceeding with the engine in reliance on such promise when he is ordered to do so.

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by Anson McDermid against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. V. Brown, A. J. Laughon, J. J. Lavin, and *Robert C. Saunders,* for plaintiff in error.

W. H. Plummer, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

*See extensive note, 30 R. R. R. 556, 53 Am. & Eng. R. Cas., N. S., 556; first foot-note of Pennsylvania R. Co. *v.* Forstall (C. C. A.), 30 R. R. R. 1, 53 Am. & Eng. R. Cas., N. S., 1; first foot-note of Cicalese *v.* Lehigh Valley R. Co. (N. J.), 29 R. R. R. 167, 52 Am. & Eng. R. Cas., N. S., 167.

HUNT, District Judge. This action was brought in the United States Circuit Court by Anson McDermid, a locomotive engineer, hereafter to be called the plaintiff, against the Great Northern Railway Company, hereafter to be called the defendant, to recover damages for an injury to plaintiff's right eye, caused by the alleged negligence of the defendant in not furnishing a guard for a lubricator glass in the locomotive. The glass exploded and partially destroyed the eye of the plaintiff. Verdict in favor of the plaintiff for $4,000, and, from a judgment thereon, the defendant sued out this writ of error.

The only specification of error relates to the refusal of the court to instruct the jury to return a verdict in favor of the defendant. The evidence of the plaintiff is substantially as follows: The plaintiff was in the employ of the defendant company as an engineer. In May, 1908, he was ordered to take an engine from Hillyard, Wash., to Troy, Mont. Upon examining the engine, preparatory to starting, plaintiff noticed the lack of a screen or guard over the lubricator glass in the cab. He immediately reported the defect to the roundhouse foreman, and requested that it be remedied. The foreman said, in answer to his report and request:

"Well, the night crew has gone. It is after 6 o'clock, and the day crew hasn't come to work yet. Everything is locked up and I can't get anything for you. You will have to go and we will send the things to you."

Thereupon, the plaintiff, relying upon the above promise of the foreman to make the repairs, ran the engine to Troy, as ordered. Upon his arrival at Troy, he reported to the defendant's foreman, that the lubricator had no screen glass, whereupon the foreman promised that he would send away for one and repair the defect in two or three days. Thereupon, the plaintiff continued, according to orders, to run the engine in its unsafe condition, relying on this promise of the foreman and on subsequent promises given every two or three days. On the eighth day after the discovery and first report of the defect, while the plaintiff was running his engine, relying on the promise of the foreman soon to remedy the defect, the unguarded lubricator glass exploded and drove a piece of glass into the plaintiff's eye, thereby injuring him severely.

It is well established that if a servant who has knowledge of the defects in a machine gives notice to his master, or his proper representative, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that they will be remedied within a reasonable time, is not, necessarily, either contributory negligence or within the assumption of risk. The questions involved are for submission to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken

of the facts the evidence tends to establish. Kreigh *v.* Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612; Northern Pac. R. R. *v.* Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. We think this case was properly submitted under these principles. The jury found that the plaintiff was not guilty of contributory negligence; nor did he assume the risk.

But the defendant would have us decide that, as a matter of law, the plaintiff cannot recover because the undisputed facts of the case show conclusively that he was guilty of contributory negligence in this: That the plaintiff was bound by the rules of the company to do the very thing for the lack of doing which he was injured, namely, seeing to it that the guard was provided before he took the engine out on the trip. The rule upon which the defendant bases its contention is as follows:

"Rule 468. 'Before starting on a trip, they must examine their engines so as to know that they are in safe condition to operate; that all steps, handrails and handholds are in perfect condition; that water and lubricator glasses and guards for same are in perfect condition, and must provide themselves with enough extra water and lubricator glasses and guards for same to replace any that may be broken.'

"'a. Under no circumstances must they permit water and lubricator glass guards to be removed while engines are under their charge.'

"'b. It is the right and duty of engineers to take sufficient time to make such examination of their engines, before using same, as will avoid exposing them to unusual and unnecessary dangers by reason of any defective condition of same.'"

Defendant's contention is based upon a construction of this rule, to the effect that it is the engineer's duty to repair his engine, or see to it that the repairs are made. But it is apparent to us that neither the letter nor the spirit of the above rule supports this construction. Undoubtedly, the rule prescribes that the engineer shall examine his engine for defects, but there is nothing in it to lead us to believe the engineer must also repair defects when found, or be responsible for the repairing. As confirmatory of our view, we observe that "Roundhouse foremen, Rule 452," provides that the roundhouse foreman shall make repairs, or see to it that they are made. Thus, there is a positive duty to repair imposed upon the roundhouse foreman. The defendant argues that, under any construction, responsibility for repairs is put upon the foreman and the engineer jointly. There being, however, nothing tending to show that such responsibility is in the engineer, it is more consistent with reason and the generally known exigencies of railroading to believe that this is the duty of the foreman alone. The necessity for the delegation of labor among railway employees is a matter

of common knowledge. An engineer, whose duty it was to repair the defects which might arise from time to time in his engine, would have little time for anything else. It is also insisted that rule 468, quoted, forbids an engineer to take out an engine which is defective in any particular, and that, therefore, the plaintiff in this case disobeyed a plain rule of the company and cannot recover.

Railway rules are presumed to have been drawn up with care and study, and the meaning of the company ought to be expressed in clear and concise language. But if the intent and meaning are not so expressed, and the meaning of any particular rule is ambiguous or uncertain, it should be construed in its stronger sense against the company and in favor of the employee. In the case at bar, does the rule plainly and unambiguously prohibit the taking out of a defective engine? It seems to us clearly not.

We have seen that the duty of making repairs devolved solely upon the foreman. He was fully capable of binding the company by a promise to the engineer concerning the duty which the company owed the engineer, the performance of which had been delegated to the foreman. Cincinnati Ry. Co. *v.* Robertson, 139 Fed. 519, 71 C. C. A. 335; Hough *v.* Railway Co., 100 U. S. 213, 25 L. Ed. 612.

The defendant attempts to distinguish the cases above cited from the one before us. There are some slight differences, it is true, but the principle on which the decisions cited rest is the same as that on which this case is based. Defendant insists that in the Hough Case, supra, the engineer was under the direct control of the foreman, while here, the engineer was not thus under his control, and that this lack of authority of the foreman over the engineer is fatal to the imputation to the company of promises made by the foreman to the engineer. The defendant again takes an erroneous view of the relative positions and duties of the foreman and of the engineer. The foreman was the superior of the engineer, at least, in regard to repairing the engine. He was the representative of the defendant company in matters within the domain of repairing and mending engines. Moreover, it appears from the evidence that when orders came from headquarters, it was the duty and right of the foreman to select the engine and crew to execute such orders. This power to designate what engine and engineer should perform the work makes the foreman the superior of all those who may come within the purview of his selection. He commands them to execute the orders which come through the train dispatcher. If the engineer thus selected by the foreman to perform service is told to do it with a defective engine, and if he complains of the defect to the foreman, and is promised that it will be soon remedied, and is told by the foreman that in the

meanwhile, he must use the engine in its defective condition, it is but reasonable to say that the engineer is using that particular engine at the command of the company, and that he has a right to rely on the foreman's promise that the defect will soon be remedied, as the promise of the company. There is nothing in the nature of the defect in the present action and the means of remedying it, which make this case essentially different from Railway *v.* Robertson, supra.

Objection is also made that the promise was insufficient in fact, in that it was never performed, and had not been performed within a reasonable time between the promise and the injury. Of course, if the promise had been performed, this cause would not now be before this court. What constituted a reasonable time between the promises and the injury was clearly a question for the jury, and its conclusion will not be questioned.

After examination of all the points urged for review, we are of opinion that there is no substantial ground for a reversal.

Judgment affirmed.

FARRIS *v.* SOUTHERN RY. CO. *et al.*

(Supreme Court of North Carolina, Dec. 15, 1909.)

[66 S. E. Rep. 457.]

Master and Servant—Railroads—Employees' Custom of Crossing Tracks on Path—Notice.—A custom of railroad employees to cross the railroad yards and tracks on a path to reach their homes and boarding places more quickly and return to their work more promptly, continued for six months, and observed by the railroad without protest or objection, had continued long enough to fix the railroad company with knowledge of its existence.

Master and Servant—Injury to Employee Crossing Track—Making Flying Switch Across Pathway.—For a railroad company to make a flying switch in its yards across a pathway which its employees were accustomed to use in going to and from their boarding houses, to the knowledge of the company, at about the hour when they would be using it, without stationing anybody upon the cars so switched to give warning and keep them in control, and without ringing the bell or giving any signal, is negligence.

Negligence—Contributory Negligence—Burden of Proof.*—Contributory negligence is not presumed, but must be alleged and proved by showing either omissions to observe cautions or the doing

*See last foot-note of Evansville & T. H. R. Co. *v.* Berndt (Ind.), 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535.

of acts from which only one inference—that of negligence—can be drawn by men of ordinary intelligence.

Railroads—Crossing Accidents—Duty to Look and Listen.†—A person about to cross railroad tracks is not necessarily negligent as matter of law in failing to continue to look and listen at all times for approaching trains, where he was misled by the railroad company, or his attention was rightfully directed to something else as well.

Master and Servant—Questions for Jury—Contributory Negligence.—In an action for death of a railroad employee killed by a flying switch while crossing tracks on a customary path, the question of decedent's contributory negligence held, under the evidence, to be for the jury.

Master and Servant—Injury to Servant—Concurring Negligence—Liability—Instructions.‡—Where there was concurring negligence of plaintiff and defendant, the ultimate liability depended on whether defendant could have avoided the injury by the exercise of reasonable care under the circumstances; and hence in an action for the death of a railroad employee, killed while crossing tracks in the yards, where the issues of negligence of both the railroad company and decedent were submitted, the issue of last clear chance was also properly submitted, since, if the jury found for defendant upon the issue of decedent's negligence, defendant's liability would depend upon their finding upon the issue of last clear chance.

Appeal and Error—Harmless Error—Admission of Evidence.—In an action for the death of a person killed at a railroad crossing, the admission of evidence that the company could have provided a safe way of crossing by building at small cost an overhead bridge, directed solely to the issue of defendant's negligence, and improper because suggesting a cause of damage too remote, was not prejudi-

†See foot-note of Barthelmas *v.* Lake Shore, etc., Ry. Co. (Pa.), 34 R. R. R. 378, 57 Am. & Eng. R. Cas., N. S., 378; third foot-note of Lundergan *v.* New York Cent., etc., R. Co. (Mass.), 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344; foot-note of Bistider *v.* Lehigh Valley R. Co. (Pa.), 33 R. R. R. 492, 56 Am. & Eng. R. Cas., N. S., 492.

‡For the authorities in this series on the subject of concurrent negligence, see fifth foot-note of Bourrett *v.* Chicago, etc., Ry. Co. (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; eighth foot-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; second head-note of Irwin *v.* Louisville & N. R. Co. (Ala.), 34 R. R. R. 11, 57 Am. & Eng. R. Cas., N. S., 11; fourth head-note of Blodgett *v.* Central Vt. R. Co. (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

For the authorities in this series on the subject of the last clear chance doctrine, see last foot-note of Powers *v.* Des Moines City Ry. Co. (Iowa), 34 R. R. R. 597, 57 Am. & Eng. R. Cas., N. S., 597; first foot-note of Bourrett *v.* Chicago, etc., Ry. Co. (Iowa), 34 R. R. R. 284, 57 Am. & Eng. R. Cas., N. S., 284; fourth foot-note of Norfolk & P. T. Co. *v.* Forrests's Adm'x (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

cial, where the other uncontradicted evidence showed defendant's negligence, and the improper evidence could in no way have influenced the finding of the jury on the other issues.

Appeal from Superior Court, Burke County; J. S. Adams, Judge.

Action by W. L. Farris, administrator of Stanley Farris, against the Southern Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

His honor submitted issues to the jury, presenting (1) the negligence of the defendants; (2) the contributory negligence of the plaintiff's intestate; (3) the last clear chance; (4) damages. The jury answered all the issues in favor of the plaintiff, and assessed damages in the sum of $6,000. The case was heard entirely upon the evidence of witnesses offered by the plaintiff. The defendant offered no testimony, and moved for judgment of nonsuit at the close of the evidence, which motion was disallowed and defendant excepted. This exception, together with exception taken to the adverse rulings of his honor in admitting certain evidence of the plaintiff, and exceptions to his honor's charge, present the questions for consideration. The evidence offered shows the following facts: Stanley Farris was killed on May 29, 1907, at about 12 o'clock of the day, by being run over by four gondola cars moving on a track in the yard of the defendant Southern Railway Company at Asheville. The intestate was an employee of the defendant company, and had been in its service for about eight months prior to his death. The defendant company was doing on its yards at Asheville a large amount of work, rearranging its tracks, widening its yard, increasing the number of tracks, and building a stock pen. The intestate had been constantly and regularly at work for defendant company, engaged in doing different jobs, as a water boy, carrying water for the other employees, etc., and for a week prior to his death had been assisting in building the stock pens. The stock pens were on the south side of the yards. The intestate lived on the north side of the yards. On the south side the embankment was about 3 or 3½ feet high, on the north side about 25 feet, except at a depression. The employees of the defendant company, numbering from 100 to 150, some of whom worked on the yards, others elsewhere, together with other laborers working for a tannery on the south of the defendant company's yards, crossel the yards to and from the depression in the embankment on the north side to and from the south side from two to three times daily. A whistle, sounded at the roundhouse of the defendant company, gave the signal for its employees to stop at the noon hour for dinner. The place above described, where the large number of employees crossed the yards, was about three-fourths of a mile to a street crossing on

the east, and about 700 yards to a street crossing on the west, and from bank to bank was about 100 yards. This place contained 18 or 20 tracks. When Stanly Farris, the intestate, started to cross the yards, on May 29, 1907, at 12 o'clock of the day, there were many cars standing on the tracks to the east of him, about 30 to 35 yards. He crossed the first and second tracks in safety, and was walking down the space, from six to eight feet wide, between these tracks. He was walking westward, and had gone a few steps when an engine, moving on the third track, from the south, at from 35 to 40 miles an hour, passed him, blowing off his hat, which fell on the second track, and, as he stopped to pick it up he was struck, run over, and killed by the four gondola cars loaded with coal. The defendant company, through the codefendants, Smith, its conductor, and Mooneyham, its engineer, had made what was called "a flying switch," and four coal cars were sent westward on the second track and were moving at the rate of 8 or 10 miles an hour, and the engine took the third track. The switch at which the engine was separated from the coal cars was 25 or 30 yards east of the intestate. No bell was rung, whistle blown, or other signal given by the rapidly moving engine. The coal cars were moving noiselessly, with no watchman on any of the four cars, and no warning given to intestate of their approach. The intestate was about 17 years of age, sober, hardworking, in good health, saving of his wages, and was at the time earning $1.35 per day. From the judgment entered on the verdict, the defendants appealed to this court.

S. J. Ervin, for appellants.
Avery & Avery and *Avery & Ervin,* for appellee.

MANNING, J. The question first presented for our consideration is the negligence of the defendants. If the evidence does not prove, or tend to prove, a breach of duty by the defendants towards the plaintiff's intestate, and that such breach of duty resulted proximately in the injury complained of, then it must follow that the motion to nonsuit ought to have been allowed for failure of proof on the first issue. In Wilson *v.* Railroad, 142 N. C. 333, 55 S. E. 257, Mr. Justice Brown, speaking for this court, said: "The attempt to make a running switch across a much frequented street is not only a negligent, but a most dangerous and unwarranted operation, and has been so held by a number of courts. Bradley *v.* Railroad, 126 N. C. 735, 36 S. E. 181; Brown *v.* Railroad, 32 N. Y. 597, 88 Am. Dec. 353; Fulmer *v.* Railroad, 68 Miss. 355, 8 South. 517; Railroad *v.* Summers, 68 Miss. 566, 10 South. 63; French *v.* Railroad, 116 Mass. 537; Railroad *v.* Garvy, 58 Ill. 83; Railroad *v.* Baches, 55 Ill. 379. It matters not whether the purpose was to 'shunt' the car off on a switch, or to give it force enough to roll along on

the same track. It is negligence to permit a car to be 'cut loose,' and roll uncontrolled by any one across a much used crossing." In Allen *v.* Railroad, 145 N. C. 214, 58 S. E. 1081, the same learned justice said: "The word 'kicking' seems to be used in railroad parlance, as synonymous with making a flying 'switch.' This court has never held such operations to be per se negligence in respect of the employees performing them. It is the attempt to make a running switch when the detached car has no brakeman on it and is under no control that is declared to be negligence, because highly dangerous. Wilson *v.* Railroad, 142 N. C. 336, 55 S. E. 257, and cases there cited." Vaden *v.* Railroad, 150 N. C. 700, 64 S. E. 762. In Bradley *v.* Railroad Co., 126 N. Co. 735, 36 S. E. 181, this court held: "A crossing which the public have been habitually permitted to use is treated as a public highway crossing. Russell *v.* Railroad, 118 N. C. 1098, 24 S. E. 512." In 3 Elliott on Railroads (2d Ed.) § 1265g, this learned writer says: "The practice of making running or flying switches is inherently dangerous, and is so considered by the courts in numerous decisions. The courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track, thus inflicted, on the ground of negligence. The case of this negligence seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for footpaths and crossings, without objection from the company, though not at a public crossing. It would seem a duty owed by the railroad company, even to trespassers, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger." Conley's Adm'r *v.* Railroad, 89 Ky. 402, 12 S. W. 764; Railway Co. *v.* Crosnoe, 72 Tex. 79, 10 S. W. 342. In Vaden *v.* Railroad, 150 N. C. 700, 64 S. E. 762, Mr. Justice Brown, speaking for the court, in stating the facts of that case, said: "The evidence for the plaintiff tends to prove that he was killed about 30 feet from where Tomlinson street crosses the tracks. The evidence of the defendant locates him farther from the crossing. All the evidence shows that these switch tracks were situated in a populous part of the city and adjacent to and close by factories, where many people of all ages were employed. At the time the intestate was killed the factory had just closed for the day, and the employees were filling the streets and crossings. The court permitted evidence to the effect that there is much passing by school children, factory hands, and citizens generally along Tomlinson street and in the vicinity of the accident, to which defendant excepted. We see no objection to this evidence. It tended to establish conditions that should have put the defendant on notice as to the necessity for caution in moving its cars at that point. Railroad *v.* Smith, 93 Ky. 449, 20 S. W. 392, 18 L. R. A. 66."

In the present case, the intestate of plaintiff occupied, toward the defendant company, the relation of employee, and of this relationship the law certainly fixes the company with knowledge. He was not a trespasser in crossing its tracks. He, together with a large number of other employees of defendant company (among them others, not employees, were intermingled), some of whom worked on the yard, others on the stock pens, had been accustomed for about six months to cross the yards at or about the place where plaintiff's intestate was killed, and at least one of the hours during the day when they crossed the yard was indicated by a whistle from the roundhouse of defendant company. Crossing at this point enabled the employees to reach their homes and boarding places more quickly and to return to their work more promptly. A custom of its own employees continuing for six months, and observed by it without protest or objection from the defendant company, we must hold to have continued long enough to fix the defendant with knowledge of its existence. In addition, the defendants in their joint answer admit that the intestate of plaintiff was accustomed in going in a direct course to and from his place of employment to his boarding house to pass through the yards of the defendant company and cross its tracks. In Bordeaux *v.* Railroad, 150 N. C. 528, 64 S. E. 439, it was held "undoubtedly culpable negligence" to "kick" a car on a track in a shifting yard, resulting in injury to plaintiff, who was at work on a car on that track, but who failed to observe a rule of the company by placing a signal flag on the car, as notice to engineers operating the shifting engines; there being evidence that the rule was much violated on "short jobs," to the knowledge of the superintendent and engineers in the yard, and that the employees of the kicking engine saw repairers at work on the car. Under the authorities cited, we think the evidence clearly sufficient to sustain the finding of defendant's negligence by the jury in response to the first issue, and that the negligent act of the defendants continued up to the collision of the cars with plaintiff's intestate, and without which the accident would not have happened.

We proceed next to the consideration of the motion to nonsuit, as it applies to the second issue—the contributory negligence of the plaintiff's intestate. Upon this issue, his honor charged the jury: "It is the duty of persons going on the track of a railroad company to stop and look and listen for any train that may be moving or lying on the track of such company, and on its yards, where there are several tracks used for shifting cars, to be continually alert and on the lookout for a moving train or cars, and, if a person fails in this duty, and in consequence of such failure is injured by moving cars, the person would be guilty of contributory negligence." While the burden of this issue rested on the defendants, the burden of duty rested

upon the intestate. The law does not presume contributory negligence. It must be alleged and proven. The defendant must show such facts—either omissions to observe such cautions or the doing of such acts—from which only one inference, to wit, the plaintiff's negligence, can be drawn by men of ordinary reason and intelligence. Of the conduct and acts of the intestate the evidence discloses these facts: When he entered upon the yard, he saw an engine and cars moving east of him. He crossed the first and second tracks, moving somewhat to the northwest. He had taken a few steps between the second and third tracks, and was about to cross the third track, when the engine sped by him at the rate of 30 to 40 miles per hour. The draught caused by the rapidly moving engine blew off his hat, blowing it on the second track which he had just crossed in safety. As he stooped to catch his hat, he was struck by the coal cars and killed. The cars were moving at the rate of 8 or 10 miles an hour. The switch was 25 to 30 steps east of intestate. To make the flying or running switch with engine moving in front, it is, of course, necessary that the start must be made sufficiently beyond the switch to enable the engine to acquire such speed as to be uncoupled before reaching the switch, so far in advance of the cars as to permit the switch to be thrown and to send the detached cars a desired distance on the track. The engine had acquired the speed of 35 or 40 miles per hour, and must have been making the noise usual to engines moving at such speed. According to one of the eyewitnesses, the detached cars were moving noiselessly. It can easily be inferred that, in the close presence to the rapidly moving engine, the intestate could not have heard any noise from the moving cars. He had just crossed in safety the track upon which these cars were noiselessly moving, unguarded by any person stationed on them to warn him of their approach. His position and purpose were known to the defendants. The danger of a misstep, or of deviating from an exactly straight line, was obvious to the defendant engineer. The rapidly moving engine, passing intestate, was naturally calculated to make him draw away from it. The natural impulse was to grab at his hat and stoop to pick it up. A watchful brakeman on the cars "keeping a continuous outlook" would assuredly, seeing his position of peril, have warned the intestate, and by such timely warning a human life would have been saved. Sawyer *v.* Railroad, 145 N. C. 24, 58 S. E. 598. There was, however, no brakeman or guard on these cars, no warning was given of their noiseless approach, and the only negligent act of the intestate, which the defendants allege contributed to the intestate's death and was its proximate cause, was his yielding, under the circumstances described, to a natural impulse in stooping to grab his hat. It is not apparent that, if intestate had turned to look behind to see if danger approached, he would

not have been stricken, as the space between the cars passing on the adjacent track did not exceed two feet. While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts, yet "it cannot always be said that he is guilty of contributory negligence as a matter of law because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company, or his attention was rightfully directed to something else as well." 3 Elliott on Railroads, § 1166a. Or that he failed to look in opposite directions at the same moment of time. As is said by Mr. Justice Hoke in Sherrill *v.* Railroad, 140 N. C. 252, 52 S. E. 940: "It is further held that, negligence having been first established, facts and attendant circumstances may so qualify this obligation to look and listen as to require the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed." Inman *v.* Railroad, 149 N. C. 123, 62 S. E. 878; Morrow *v.* Railroad, 146 N. C. 14, 59 S. E. 158. It must not be overlooked in reaching a conclusion in this case that the act which occasioned plaintiff's intestate to be killed was immediately caused by the rapidly moving engine passing within two feet of him at a time and place where defendants admit that they knew the intestate would be crossing, and at a time and place where the uncontradicted evidence shows that between 100 and 150 employees of defendant company and others were accustomed to cross the tracks of the yard. We are therefore of the opinion that the motion to nonsuit upon the evidence bearing on the second issue ought not to have been allowed, and that his honor did not err in submitting this issue to the jury. The defendants objected to his honor submitting the third issue—that issue presenting the "last clear chance." While this issue has become immaterial in view of the finding of the jury on the first and second issues, we think it was proper for his honor to have submitted it. If the jury had found with defendants on the second issue, having found the first issue with plaintiff, the ultimate liability of defendants would have been determined by their finding on the third issue. In the presence of the concurring negligence of a plaintiff and a defendant, it is a generally accepted doctrine, and well settled in this state, that the ultimate liability must depend upon whether the defendant could, at the time, have avoided the injury by the exercise of reasonable care under the attendant circumstances. Ray *v.* Railroad, 141 N. C. 84, 53 S. E. 622; Reid *v.* Railroad, 140 N. C. 146, 52 S. E. 307; Lassiter *v.* Railroad, 133 N. C. 244, 45 S. E. 570; Arrowood *v.* Railroad, 126 N. C. 629, 36 S. E. 151; Pickett *v.* Railroad, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611.

During the trial the plaintiff, over defendant's objection, was permitted to offer evidence tending to show that the defendant company could have provided a safe way of crossing by building at small cost an overhead bridge. This evidence was directed solely to the first issue, and, while we are of the opinion that neither the defendant company nor its codefendants were under the duty under the facts of this case to erect such overhead walkway or bridge, yet as we have concluded that the uncontradicted testimony, independent of this evidence, was plenary of the defendant's negligence, and his honor, upon such other testimony, would have been justified in instructing the jury to answer the first issue against the defendants, subject only to their belief in the credibility of the witnesses, we cannot see under such circumstances that the admission of such evidence was reversible error. This evidence could in no way have influenced the finding of the jury to the second, third, or fourth issues. The defendants, at the trial, offered no evidence at all and no evidence in any way to relieve the inference of their negligence to be drawn from the other evidence, uncontradicted in any particular by them. The testimony objected to suggested a cause of damage too remote, and for this reason we cannot see that its admission prejudiced the defendants with a jury of the intelligence we must assume our juries to possess. If we felt constrained to grant a new trial to the defendants for the admission of this evidence, we would feel constrained to restrict it to the first issue only. Bull *v.* Railroad, 149 N. C. 427, 63 S. E. 126; Reeves *v.* Railroad, 149 N. C. 244, 62 S. E. 1078; Spence *v.* Canal Co., 150 N. C. 160, 63 S. E. 729; Gaither *v.* Carpenter, 143 N. C. 240, 55 S. E. 625; Smith *v.* Lumber Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439; Hosiery Co. *v.* Calton Mills, 140 N. C. 452, 53 S. E. 140; Cherry *v.* Canal Co., 140 N. C. 422, 53 S. E. 138; Jennings *v.* Hinton, 128 N. C. 214, 38 S. E. 863; Clark *v.* Moore, 126 N. C. 1, 35 S. E. 125.

As we have reached the conclusion that no reversible error was committed in the trial of this action, the judgment of the court is affirmed.

DUVALL *v.* SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, May 4, 1910.)

[67 S. E. Rep. 1008.]

Master and Servant—Injuries to Employee—Scope of Employment.*—A railroad baggageman, tending to local freight in the baggage car, is not without his employment in stepping into the express car so as to preclude his recovery for injuries sustained while in that car, especially where it was part of his duty to tend to any through freight which was placed in the express car, and where, if he had stayed in the baggage car, he would have probably been more seriously injured.

Master and Servant—Collision between Trains—Presumptions.†—A head-on collision between trains, whereby a railroad employee was injured, raises a presumption of negligence.

Appeal from Superior Court, Moore County; Lyon, Judge.

Action by E. N. Duvall against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. No error.

Walter H. Neal, U. L. Spence, and *Burwell & Cansler,* for appellant.

H. F. Seawell and *Douglass & Lyon,* for appellee.

CLARK, C. J. The plaintiff was baggagemaster and flagman on the defendant's road. This action was brought for personal injuries sustained by him in a head-on collision near Sanford on a through train, going south. The exceptions are numerous, but the real points in the controversy lie within a small compass. The defendant contends that under the federal employer's liability act the plaintiff is not entitled to recover, for three reasons: (1) That at the time of the injury the plaintiff was not an employee of the defendant; (2) that he was not injured while in interstate commerce; (3) that he was not injured as the result of the defendant's negligence.

*For the authorities in this series on the question, what acts of an employee are, and are not, within the scope of his employment, see Yazoo & M. V. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54; last foot-note of Kunza *v.* Chicago & N. W. Ry. Co. (Wis.), 33 R. R. R. 347, 56 Am. & Eng. R. Cas., N. S., 347.

†For the authorities in this series on the subject of the plaintiff's burden of proof in an action against a master for the death of or injury to his servant, see foot-note of Louisville & N. R. Co. *v.* Caldwell (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560; last foot-note of Chamberlain *v.* Southern Ry. Co. (Ala.), 34 R. R. R. 655, 57 Am. & Eng. R. Cas., N. S., 655; Christensen *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253.

The uncontroverted facts are that the plaintiff was baggagemaster and flagman, and was so employed at the time of the injury; he carried local baggage in the baggage car and through baggage in the express car; at the time of the accident the train was nearing Sanford, going south, at which point this through train stopped, and where through baggage might be taken on. The plaintiff stepped from the baggage car into the express car, and soon thereafter the collision occurred in which he was seriously injured. The defendant contends that by going from the baggage car to the express car the plaintiff ceased to be an employee, and was not engaged in the scope of his employment. But the fact is that his duties called him to the express car as well as to the baggage car; and, even if it had not, the fact that the baggageman stepped into the adjoining express car for a moment would not have terminated his employment, or put him out of the scope of his duties. There is no evidence that being in the express car in any wise enhanced his risk or contributed to his injuries. In fact the probabilities are that, had he remained in the baggage car he would have been more seriously injured, or possibly killed, by the trunks falling upon him. The evidence is that the baggage car was more seriously damaged than the express car. The plaintiff's going into the express car was not an unlawful act, and under the circumstances could not have affected his employment or the responsibility of the company. Besides, his duty lay in the express car, as well as in the baggage car; for in the former the through baggage, which was part of his charge, was carried, and though there was none at that time, he might prepare to receive such at Sanford. As to negligence, the head-on collision raised a presumption of negligence (Marcom *v.* Railroad, 126 N. C. 200, 35 S. E. 423, and cited cases in the Annotated Edition), and the issue of the negligence was found by the jury.

After full consideration of all the exceptions, we have been unable to find any error prejudicial to the defendant.

No error.

ST. LOUIS, I. M. & S. RY. CO. *v.* ROBINSON.

(Supreme Court of Arkansas, May 2, 1910.)

[128 S. W. Rep. 60.]

Master and Servant—Liability for Acts of Servant—Scope of Employment.*—A railroad section foreman was not working for the company on Sunday and sent men not in the company's employ with a hand car for water for the foreman's private use at his house. The foreman had no authority to employ the man for such purpose and had no authority from the railroad company to permit boys to ride on its hand cars, nor was there any custom of the company permitting boys to so ride, nor was such permission within the apparent scope of the foreman's authority. When the men started the hand car, a boy got on it to take a ride and fell off, sustaining injuries resulting in his death. Held, that the railroad company was not liable.

Appeal from Circuit Court, Chicot, County; H. W. Wella, Judge.

Action by Crawford Robinson against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

W. E. Hemingway, E. B. Kinsworthy, E. A. Bolton, and *Jas. H. Stevenson,* for appellant.

B. F. Merritt, for appellee.

FRAUENTHAL, J. This was an action instituted by Crawford Robinson against the St. Louis, Iron Mountain & Southern Railway Company to recover damages which he alleged that he sustained by reason of the negligent killing of his son, Joe Robinson, who was a minor. The appellant maintains a station at Macon Lake, a point upon its line of railroad, at which one of its section foremen resided. On the afternoon of Sunday, July 21, 1907, this section foreman requested some men to take the hand car and get a keg of water for him. The day being Sunday, the section foreman was not engaged during the entire day in performing any work for the appellant. The hand car was situated on an offset or spur on the side of the railroad track and had been locked to the rails and not used during the

*For the authorities in this series on the question whether the liability of a master for the acts of an employee depends upon whether they were committed within the scope of his employment, see foot-note of McKain *v.* Baltimore & O. R. Co. (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542; first foot-note of Hypes *v.* Southern Ry. Co. (S. Car.), 32 R. R. R. 145, 55 Am. & Eng. R. Cas., N. S., 145; first foot-note of St. Louis, etc., Ry. Co. *v.* Lavendusky (Ark.), 32 R. R. R. 97, 55 Am. & Eng. R. Cas., N. S., 97.

entire day for the purposes of appellant. The men got the hand car and placed it on the railroad track to proceed to the place where the water was located, about 300 yards from the station. A number of boys were lingering about the station. Amongst them was Joe Robinson, who was 12 years old. When the men started the hand car, these boys got on it for the purpose of taking a ride. There is a sharp conflict in the testimony as to whether or not the section foreman permitted these boys to ride on the car; but the testimony on the part of the appellee establishes the fact that he permitted them to do so. After the water was secured and while they were returning to the station upon the hand car, the boy, Joe Robinson, fell therefrom. The car ran over him, and he was so seriously injured that he died from the effect of these injuries on the following day. There is a conflict in the evidence as to the manner in which the injury occurred. Some witnesses on the part of the appellant testified that the boy jumped from the car just as it neared the station and had slackened its speed, and that after jumping from the car he fell under its wheels. The testimony on the part of the appellee, however, establishes the fact that the car was going at a high rate of speed, and that the boy fell off the car without any fault on his part. The uncontroverted testimony, however, establishes the fact that the section foreman was not on that day (which was Sunday) engaged in work of any kind for appellant. He sent for the water for his sole private use at his house. The men whom he requested to go after the water were not in appellant's employ. The foreman had no authority to employ these men for this purpose, and he had no authority from, nor was there any custom of, the appellant to permit boys to ride on its hand cars. The procurement of the water was not for the benefit of the appellant or for any of its employees while engaged in work for it, but was solely for the independent purpose and use of Williams, the section foreman. A verdict was returned in favor of appellee for $1,500, and from the judgment entered thereon the railroad company has prosecuted this appeal.

We do not think that it is necessary to set out the instructions that were given by the lower court or which were refused, and the rulings thereon of which appellant complains, because we are of the opinion that under the uncontroverted testimony the appellant was not liable for the unfortunate accident which resulted in the death of the boy, and therefore the appellant was entitled to the peremptory instruction in its favor, which it asked.

In the case of Railroad Company *v.* Dial, 58 Ark. 318, 24 S. W. 500, a boy 15 years old, at the request of the conductor of a freight train, mounted one of the box cars and undertook to throw off the brake in the car. While thus engaged, he was in-

jured by striking his head against an iron bridge as the car was moving under it. In that case it was held that the railway company was not liable on account of the permission or direction of the conductor to the boy to go upon the car, because the conductor had no express or implied authority to employ the boy or to direct or permit him to go upon the car. In that case it was further held that the proof showed that the conductor had no power to employ brakeman, and that it was not within the scope of his authority or employment to direct boys to assist the regularly employed brakeman of the company, or to direct them to go upon the cars; and that the company could not be bound and thus made liable for the act of the conductor in so doing.

In the case of Railway Company *v.* Bolling, 59 Ark. 395, 27 S. W. 492, a child of tender years was taken on a hand car at the direction of a section foreman and received injuries while riding thereon. At the time of the injury, the section crew who were propelling the car were not engaged in any work for the benefit of the company, but were bent on purposes solely their own. In that case this court held that the railway company was not liable for any injuries which the child received by reason of any negligence on the part of the section crew in charge of the hand car. In speaking of the liability of the railway company for the act of a servant done without the scope of his authority and employment, the court, quoting from approved authority, says: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence in the course of his employment as servant. Thus, it will be seen that, in the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment."

In the case of Sweeden *v.* Atkinson Improvement Co., 125 S. W. 439, a child was invited into a passenger elevator by a servant of the defendant for the purpose of taking her for a ride and was injured thereby. It was held in that case that this act of the servant was not in the line of his employment and was unauthorized by the master and was for the purpose of carrying out the independent object of the servant, and that the defendant was not liable for injuries received by the child through the negligence of the servant. In that case we said: "It will thus be seen that the test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was done while carrying out the object and purpose of the master's business; for, if the act was done without authority and solely for purposes exclusively the servant's, then the master is not liable during such

time that such acts are done. During such time he steps aside from his master's business and his employment."

In the case at bar. the undisputed evidence shows that the section foreman during the entire Sunday upon which the injury occurred was not engaged in any work for the appellant. In sending after the water he was carrying out an object that was solely his own and exclusively for his own benefit. He was not authorized to permit boys to ride on the hand car, and it was not within the apparent scope of his authority to do so; and it was not the custom of the company to allow this to be done. The men who were actually propelling the car at the time of the injury were not in the employment of appellant; and, if the injury occurred through any negligence on their part, the appellant cannot be held responsible therefor. Nor can the appellant be held liable for the act of the section foreman in permitting the boy to ride on the hand car. This permission was outside the scope of his employment and authority; it was connected with an act that was done for the exclusive benefit and purpose of the section foreman, and during a time when he had stepped aside from the business of the appellant and his employment.

The judgment is reversed, and the cause dismissed.

LAYNE *v.* CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia, November 23, 1909. Rehearing Denied May 18, 1910.)

[67 S. E. Rep. 1103.]

Exceptions, Bill of—Time for Signing and Certification.—Bills of exception may be signed, certified and made a part of the record of a trial, at any time within 30 days after the adjournment of the term at which the judgment in the action was rendered, either in vacation or in a special or regular subsequent term of the court, occurring within said period of 30 days.

Exceptions, Bill of—Time for Signing and Certification—"In Vacation."—The office of the phrase "in vacation" in the clause of section 3979, Code 1906, authorizing the taking of bills of exception after adjournment of the term at which judgment is rendered, is to empower the judge to sign, certify and make such bills parts of the record in vacation, not to limit or cut down the extension of time, impliedly granted for that purpose.

Master and Servant—Injuries to Third Persons—Special Police

Officers.*—A special officer, appointed by the Governor for police duty, at the instance of a railway company, under the authority conferred upon him by section 31, c. 145, of the Code, is prima facie a public officer, for whose act the company procuring his appointment and paying him for his services, directly or indirectly, is not liable.

Master and Servant—Injuries to Third Persons—Special Police Officers.—Such a special officer has all the powers and privileges of a duly elected or appointed constable in the counties in which he files the oath taken by him, or copies thereof, and his public functions and powers are therefore more extensive than those of railway conductors, who are conservators of the peace only while in charge of their trains.

Carriers—Injuries to Third Persons—Special Police Officers—Dual Position.†—A public officer, specially employed by a common carrier to perform certain duties and services for it, is a servant of such carrier, while acting within the scope of such employment; and, if such servant, in the performance of such duties, wrongfully inflict injury upon a passenger of such carrier, the master is liable therefor, although the injurious act, so done, was willful and malicious, and prompted by motives and purposes personal to the servant, such as resentment of insults or punishment for other wrongs perpetrated upon himself.

Master and Servant—Injuries to Third Persons—Action—Question for Jury.—When the capacity in which a person, occupying the dual position of public officer and servant of a carrier of passengers, acted in a transaction in which he inflicts wrong and injury upon third persons is uncertain and dependent upon conflicting oral testimony and inconclusive facts and circumstances, the question is one for jury determination.

Carriers—Injuries to Passenger—Act of Employee.—If the injured party is a passenger of such carrier, and the officer acted, in the transaction in which the injury was suffered, in the capacity of servant of the carrier, the question of liability is determined by the legal principles applicable in cases of injury to passengers by ordinary servants of carriers.

Carriers—Carriage of Passengers—Duty to Protect from Servants.*—A carrier of passengers is under an absolute contractual duty to

*See Texas & N. O. R. Co. *v.* Parsons (Tex.), 33 R. R. R. 376, 56 Am. & Eng. R. Cas., N. S., 376 (evidence, in action against railroad for shooting trespasser, showed that person who inflicted the injury was acting as defendant's watchman, and not as deputy sheriff); foot-note of Higby *v.* Pennsylvania R. Co. (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479; foot-note of Foster *v.* Grand Rapids Ry. Co. (Mich.), 17 R. R. R. 512, 40 Am. & Eng. R. Cas., N. S., 512; second foot-note of Philadelphia, etc., R. Co. *v.* Green (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414; foot-note of Yazoo & M.

†See note on following page.

protect them from willful and unlawful injury at the hands of its servants.

Carriers—Carriage of Passengers—Injuries—Use of Excessive Force.*—Provocation on the part of a passenger, such as interference with the servants in the exercise of their functions, abusive language, threats and assaults upon servants, although justifying expulsion from the train or other vehicle of carriage, does not bar recovery for injury inflicted upon him by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other threatened injury.

Carriers—Carriage of Passengers—Termination of Relation—Alighting from Train.†—A passenger does not cease to be such by reason of his alighting from a railway train at a station, other than his point of destination, for exercise or from motives of curiosity or to engage in an altercation with a servant of the company, if he does not leave the premises of the carrier, nor the train, with intention not to return to it and resume his journey.

Appeal and Error—Harmless Error—Exclusion of Evidence—Facts Otherwise Established.—In a case in which the person, inflicting injury upon a passenger, is both a public officer and a servant of the carrier, and his status as such officer has been established by one mode of appointment or election, it is not reversible error to exclude evidence of appointment or election to the same office, or an office carrying the same power and authority, by another mode of conferring title, since no injury or prejudice could result from such error.

Carriers—Act of Servant—Injuries to Passenger—Actions—Instructions.—If in the trial of such a case, the capacity in which such person acted is uncertain and dependent upon oral testimony and inconclusive facts and circumstances, the proper inquiry for the jury is the capacity in which he acted in the particular transaction to which the infliction of the injury was incident, not the places or positions he held or occupied in general at the time, and instructions, telling the jury to find for the defendant, if they believe the actor was, at the time of the injury, a public officer, or performing the duties of such officer, and that the defendant is not responsible for his acts as such officer, are calculated to becloud the issue and mislead the jury, for which reason, the trial court may properly reject them.

Carriers—Injuries to Passenger—Actions—Instructions.—The trial

V. R. Co. *v.* Shelby (Miss.), 34 R. R. R. 54, 57 Am. & Eng. R. Cas., N. S., 54; foot-note of Birmingham, etc., Co. *v.* Parker (Ala.), 34 R. R. R. 215, 57 Am. & Eng. R. Cas., 215; Arnold *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 438, 57 Am. & Eng. R. Cas., N. S., 438; Philadelphia, etc., R. Co. *v.* Green (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414.

*See note on preceding page.

†See first foot-note of St. Louis, etc., Ry. Co. *v.* Glossup (Ark.), 32 R. R. R. 204, 55 Am. & Eng. R. Cas., N. S., 204; first foot-note of Gannon *v.* Chicago, etc., Ry. Co. (Iowa), 31 R. R. R. 27, 54 Am. & Eng. R. Cas., N. S., 27.

court may properly reject an instruction, in such a case, which tells the jury they should find for the defendant, if they believe the actor was the servant of the defendant, and that the injurious act, incident to the particular transaction in which he was engaged, was not within the scope of his duty as such servant.

Carriers—Injuries to Passenger—Action—Instructions.—In such case, an instruction which tells the jury the defendant is not responsible for the infliction of death on a passenger, if they find from the evidence that the assault was committed by the actor when he was acting for himself and his own master, is calculated to mislead the jury, and the trial court may properly refuse it.

Carriers—Injuries to Passenger—Action—Instructions.—The trial court may properly refuse, in such case, instructions telling the jury that, if the passenger left the defendant's train for the purpose of engaging in a quarrel or altercation with the servant or officer by whom he was killed, the carrier is not liable.

Trial—Request to Charge—Assumption of Fact.—The trial court may properly reject an instruction which assumes the existence of a thing which the evidence makes an open question for the jury.

Witnesses—Cross-Examination—Discretion of Court.—The trial court has discretion to refuse to permit the elicitation of evidence on the cross-examination of a witness that ought to be introduced by calling the witness to testify on behalf of the party seeking such evidence.

Witnesses—Appeal and Error—Leading Questions—Discretion of Court.—The trial court has discretion to premit the asking of a leading question, when there is a basis for such action in evasiveness or reluctancy on the part of a witness, and a new trial will not be granted for allowing such question to be propounded, when it does not appear that the discretionary power has been abused to the injury of the party complaining.

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by J. C. Layne, administrator of the estate of Robert A. Layne, deceased, against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Simms, Enslow, Fitzpatrick & Baker, for plaintiff in error.
A. M. Belcher, H. O. Middleton, and *Charles Curry,* for defendant in error.

POFFENBARGER, J. J. C. Layne, administrator of the estate of Robt. A. Layne, deceased, recovered a judgment against the Chesapeake & Ohio Railway Company, in the circuit court of Kanawha county, for the sum of $8,000; the declaration being predicated on the wrongful death of the deceased, caused by the defendant.

The bills of exception having been taken within 30 days after the adjournment of the term at which the judgment was rendered, pursuant to an order allowing the statutory period for obtaining the same, but, at special terms subsequently held within said period, and not in the actual vacation of the court, a motion to dismiss for want of bills of exception, making the evidence a part of the record, raises an inquiry as to whether the instructions and evidence, rulings on which are the principal subjects of complaint, are parts of the record. As to whether the latter clause of section 3979, Code 1906, allowing time for making up, signing and certifying bills of exception, after adjournment of the term, requires these things to be done in vacation as well as within 30 days, in strict compliance with the letter thereof, or within the period of 30 days, let it be within a vacation or not, has never been decided by this court.

The clause has been interpreted in respect to the lapse of time. Bills of exception must be taken within the period of 30 days, and cannot legally be taken later. Crowe *v.* Charlestown, 62 W. Va. 91, 57 S. E. 330; Jordan *v.* Jordan, 48 W. Va. 600, 37 S. E. 556; Jones *v.* Harmer, 60 W. Va. 479, 55 S. E. 657; Wells *v.* Smith, 49 W. Va. 79, 38 S. E. 547; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305. Practically all other decisions of this court, relating to the sufficiency of bills of exception, involve questions other than the application of the statute or its interpretation. In requiring obedience to the time limit, we do not construe it. Being perfectly plain and unequivocal as to that, it is not susceptible of construction. We merely enforce it. It is said we have applied the rule of strict construction to it, but we find no evidence of this in any of the decisions. It is a remedial statute and falls under the liberal rule of construction, giving effect to the spirit, intent and purpose more than to the letter. We have said the Legislature intended by it to extend the time for the allowance of bills of exception. That is its purport. In saying this, we have not gone beyond its terms, and hence have not construed it. The observation expresses the impression produced by the mere reading thereof. Extension of time is the substance of it. It contemplates nothing else. That is its main object. Was the phrase "in vacation" intended as a limit upon the time granted? This depends partly on the sense in which it was used. No trial court holds more than three or four regular terms a year. The commencements of terms are fixed so as to apportion the work of the year by periods, according to time and accumulation of business. In most if not all, of the circuits, the time, intervening between terms in one county, is presumptively occupied by a term or terms in one or more other counties. The time elapsing between the commencements of regular terms in each county runs from three to four months. Interventions of terms

in other counties of the circuit is projected upon the theory of the completion of the business of a term in much less than that time. In some of the counties, it requires only a couple of weeks, and perhaps not more than a month in most of them. Special terms are authorized by the statute, but not fixed. They have no actuality in law. They are authorized, but not created. Looking to the fixed terms of court and the usual, ordinary, regular procedure, the Legislature perceived that ordinarily an extension of time would be in such a vacation, and the necessity of enabling the judge to do things in vacation, which, without legislative authority, he could not do. In respect to form, the clause is merely an enabling statute. Though extension of time is its prime object, there are no express or formal words of extension. The extension is really effected by necessary implication. Having decided to extend the time, the Legislature, without saying it should be extended, proceeded to confer upon the judges power to do acts in vacation which the common law does not authorize, and prescribe the method of doing them. Hence it is obvious that the real purpose of inserting the phrase "in vacation" was not to limit or curtail the extension, but to make clear the intent to confer authority to act in vacation within the 30 days as well as in term. That this incidental thing, this means to an end, was uppermost in the mind of the draughtsman, when he wrote the clause, is suggested by later expressions in it, saying "any such exception so made in vacation shall be part of the record and have the same effect as if made in term time." Observe here the absence of words, limiting this reference to the preceding term. The language is indefinite, general, applicable to any term, showing the writer was dealing with the distinction between the judge's powers in term and lack thereof in vacation, and removing, or relieving from, the latter, so the allowance of time, impliedly made, could become available.

Pursuing the inquiry further we note the lack of any direct or express terms, saying the time allowed shall be shortened by the occurrence of a term before the expiration of 30 days. Failure to mention, or provide for, this contingency may be used as an argument in contention for the view that there was intent to allow it to shorten the time granted, but it is certainly not conclusive. Nor is the form of expression in which authority to sign bills of exception is conferred, saying the court may, in vacation, within 30 days. All the way through, the clause is silent as to what shall result in the event of cessation of the vacation before the expiration of 30 days. The express terms merely confer power to act in vacation. They go not a step further. They assume the existence of a 30-day vacation, and ordinarily there is one. No other situation was contemplated, provided for, or within the terms of the clause. No statutory

authority to act in term time was needed. There was common-law authority. The intention to allow 30 days cannot be doubted, though it is not formally expressed. It is necessarily implied, if the vacation lasts that long. Why should it have been given under some circumstances, and not under others, for the business of some terms, and not for others, for terms followed by long vacations only, and not terms followed by short ones, or practically none at all. Nobody can assign a substantial, or even plausible, reason for such discrimination. All that can be said in support of justification of the allowance in the one case applies with equal, if not, indeed, greater, force in the others. Allowance of 30 days, after the expiration of terms for bills of exception, being the primary purpose of the clause, though not formally expressed, and a highly important, indeed, indispensable, function for the phrase "in vacation" other than that of cutting down or limiting the period, contingently or otherwise, being perceived, we think the rules of construction neither require us to give this phrase any other or further operation or effect, nor would justify us in doing so. The implied grant of 30 days' time is just as good and effectual as if it were an express grant. State *v.* Harden, 62 W. Va. 313, 315, 351, 58 S. E. 715, 60 S. E. 394; Delaplane *v.* Crenshaw, 15 Grat. 457; Postmaster Gen. *v.* Early, 12 Wheat. 136, 6 L. Ed. 577. Carrying the extension into a succeeding term is justified by the plain manifestation of legislative policy to allow a certain period of time for the doing of a certain thing. There was a grant of time. It was not an express grant. It is not expressly limited otherwise than to 30 days. That limit is the only expression indicating the legislative will as to the extent of the time allowed. The use of the phrase, "in vacation," in connection with it, though necessary in one sense, is merely accidental in so far as it may seem to import intent to reduce the time, on the occurrence of a subsequent term within the 30 days. The terms used necessarily carry the intent to grant 30 days, but do not necessarily import intention to cut it down. Some words used could be regarded as indicating intention to reduce the period, but need not be. They are used for another clear, distinct, and indispensable purpose, and that satisfies the rule of construction, requiring the court to give effect to all parts of the clause. We are not bound to give it any further effect. Words not expressed are never read into a statute unless they are in some sense necessarily implied. White *v.* Bailey, 65 W. Va. 573, 64 S. E. 1019; United States *v.* Fisher, 2 Cranch, 358, 2 L. Ed. 304; Jackson *v.* Lewis, 17 Johns. (N. Y.) 475; Turnpike Co. *v.* People, 9 Barb. (N. Y.) 161; Morgan *v.* Railroad Co., 96 U. S. 716, 24 L. Ed. 743. Our attention has been directed to the case of Hoover *v.* Saunders, 104 Va. 783, 52 S. E. 657, holding that the occurrence of a regular term before the expiration of

the 30-day period shortens the time; but we are not satisfied with the process of reasoning adopted by the Virginia court. As a comparison of this opinion with the one delivered in that case will disclose the differences between views, respecting the meaning of terms and application of the rules of construction, time and labor need not be spent in pointing them out here.

Layne came to his death by a gunshot wound, inflicted by John L. Howery, a special officer, appointed and commissioned by the Governor of the state, employed, paid and detailed by the Baldwin Detective Agency for services on the defendant's road. In general, the circumstances of the shooting were as follows: Layne and two of his brothers were passengers on one of the defendant's east-bound trains, on December 23, 1905, having boarded it at Charleston. The decedent's destination was Coalburg, that of one of his brothers, Malden, an intermediate station. Owing to the crowded condition of the train, the latter had had only standing room in the chair car, the last one of the train, while the former occupied a seat in another car. When the train stopped at Malden, the chair car occupant alighted and started away without having paid his chair car fare. The train porter demanded the fare, telling Layne he would pay it either to him or Howery, who was in a forward car, and, at the same time, called Howery. That officer responded to the call, but was informed, when he arrived, the fare had then been paid, and the trouble was all over. Immediately afterward, the decedent came up, and an altercation occurred between him and Howery, which culminated in the fatal shooting. There is much contradictory evidence as to how it began, who provoked it, whether the shooting was excusable or justifiable, and nearly all the details. As the issues raised by it were all questions of fact, proper for jury determination only, and are not materially involved in the inquiry, allowed by law to us, as to liability of the defendant, time, labor and space will not be consumed here in detailing it. It suffices to say there is ample evidence to sustain the finding of inexcusable or wrongful shooting, though it is denied and contradicted; but liability of the railway company does not necessarily follow. To establish that, other elements must be added.

Excluding, for the present, the relation of passenger and carrier, Howery was prima facie a public officer for whose wrongful acts the company was not liable. McKain *v.* B. & O. R. R. Co., 65 W. Va. 233, 64 S. E. 18; Healey *v.* Lothrop, 171 Mass. 263, 50 S. E. 540; Tucker *v.* Railway Co., 69 N. J. Law, 19, 54 Atl. 557; Cordner *v.* Railway Co., 72 N. H. 413, 57 Atl. 234; Foster *v.* Railway Co., 140 Mich. 689, 104 N. W. 380; Tyson *v.* Bauland Co., 186 N. Y. 397, 79 N. E. 3, 9 L. R. A. (N. S.) 267; Smith *v.* Railway Co., L. R. 5 C. P. 640. Nevertheless, if he was engaged in some sort of service for the cor-

poration, and did a wrongful act in the course of such service, and within the scope of his employment, or by express direction of his employer, the latter is liable. See authorities just cited, and Deck *v.* Balt. & O. R. R. Co., 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; Brill *v.* Eddy, 115 Mo. 596, 22 S. W. 488; Dickson *v.* Waldron, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 41 Am. St. Rep. 440; Sharp *v.* Erie Ry. Co., 184 N. Y. 100, 76 N. E. 923; Thomas *v.* Railway Co., 14 Ont. L. Rep. 55. When there is no controversy as to the relation the officer bears to the defendant, respecting the wrongful act, the question of liability is clearly one of law for the court. Healey *v.* Lothrop and Tyson *v.* Bauland Co., cited. But there is frequently contradictory evidence as to employment, the nature and extent of the service, and other matters, pertaining to the authority or lack of authority in the officer to act on behalf of the defendant, and, in all such cases, the jury must determine whether there is liability or not. Sharp *v.* Erie Ry. Co., cited; Deck *v.* Railway Co., cited. The defendant is not liable merely because it procured the appointment of the officer or pays his salary or does both. Tyson *v.* Bauland Co., cited; Tolchester, etc., Co. *v.* Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; Foster *v.* Railway Co., cited. From these propositions, it results, as a necessary sequence, that the plaintiff has the burden of showing express or implied authority in the officer to perform the injurious act for and on behalf of the defendant. As such authority may be express, as by request or direction, or implied, as by employment of the officer and inclusion of the act, of which the killing was an incident, within the scope of the service to be rendered, it is sometimes necessary to seek it in a mass of contradictory oral evidence and inconclusive, but relevant, circumstances. These are general principles of the doctrine of respondeat superior, not materially altered or varied by the fact that the servant is also a public officer. This additional circumstance simply raises a question as to the capacity in which the party, holding the two positions at the same time, acted, and often forms the basis of an hypothesis for jury consideration which would not otherwise exist.

But the peculiar relations subsisting among the parties, the decedent, the defendant and the officer, raise an inquiry as to the applicability of other principles. The decedent was a passenger on the defendant's train, if he did not lose his status as such by unnecessarily getting off at Malden, and Howery was a servant of the railway company, charged with duties respecting that train. The passenger's life, limbs, soundness of body and peace of mind are priceless to him. The safety of these he intrusts to the carrier, for the time being, at the invitation of the latter and for compensation, deemed adequate for reasonable provision therefor. Hence, the carrier is under a special duty

negatively to abstain from all negligent or wrongful acts, injurious or dangerous to the passenger, and positively or affirmatively to do what is reasonably necessary to protect him from injury, and the care and diligence to be observed is accentuated and emphasized by the immeasurable value of the thing committed or intrusted to the carrier. Loss of life, limbs, health and mental peace cannot be compensated in the true sense of the term, and the duty of a bailee or employee is always heightened by the value of the thing committed to his custody or subjected to his action. To say a very high degree of care, on the part of a carrier, for the safety of passengers, is required, therefore, accords fully with legal principles, well settled and operative throughout a vast portion of the great domain of our jurisprudence. Generally, the courts say the carrier must exercise that great degree of care, prudence and foresight which a prudent man engaged in the business, as usually conducted, would employ; that is, such as is reasonably practicable, but not such as is barely possible. 6 Cyc. 592. This general principle covers many instances of duty, such as the fitness or suitability of the means, of conveyance, competency of servants, and precautions against injury by fellow passengers and strangers. In none of these cases is the contract one of guaranty. It does not cover inevitable accident or that which cannot be foreseen and prevented by reasonable prudence and diligence. Extraordinary and practically inconceivable occurrences are not within the contemplation of the parties in the making of the contract, wherefore injury from them imposes no liability. Viewing the duty of the carrier as having been imposed by law, we call the cases arising under this principle negligence cases, but, in the broader and perhaps truer sense, they involve contractual rights and duties, and present nothing more than questions as to what the contracts were and whether they were broken. However this may be, the carrier undoubtedly owes to the passenger many contractual duties, nonperformance of which is not excused by diligence and good faith, and in respect to which liability follows failure as certainly and inevitably as a right of recovery arises on the nonpayment of a debt. Is the right of a passenger to immunity from intentional injury at the hands of the servants of the carrier within this principle? It seems so.

"The carrier, like any other master carrying on his business by means of the employment of servants, is liable for the injuries resulting from the incompetency, negligence, or wrongful acts of his servants, irrespective of whether he has used due care in the employment of such servants, or whether the act is contrary to the master's orders, even though it be willful or malicious." 6 Cyc. 598. "The duty of the carrier to protect the passenger must be discharged by means of his servants engaged in carrying out the transportation contracted for. There-

fore, if any servant of the carrier, while thus engaged, assault a passenger or otherwise infringe the right of protection to which he is entitled, the carrier is liable, irrespective of whether the servant in the thing done was acting for his master or for his own purposes." 6 Cyc. 600. "It has been frequently held that a carrier of passengers is liable for the tortious acts of its servants, even though willful or malicious, if done within the scope of their employment, this being the generally accepted doctrine upon this question wherever the relation of principal and agent or master and servant exists, and not being peculiar to carriers of passengers. And many of the latest and best-considered cases would seem to go further, recognizing a distinct rule as applicable to carriers of passengers, and holding them liable for the willful and malicious acts of their servants or agents resulting in injuries to passengers, whether done in the time of their employment, or service, or not, if done during the course of the discharge of their duty to their employers which relates to the passengers. The ground upon which the cases which recognize this doctrine proceed is that the carrier, as part of its contract of carriage, is bound to protect the passenger from all tortious acts of its servants, and that for a breach of this contract, however occasioned, a passenger may recover." 5 A. & E. Enc. L. 541-543. This makes the liability rest, not upon instigation, encouragement, or express or implied authorization of the master, but upon the breach of the carrier's obligation, and the inquiry is, not whether the servant acted as the carrier's agent in inflicting the injury, but whether the master has broken his contract for the safe carriage of the passenger. This is the certain import of the decisions of this court. Ricketts *v.* Ches. & O. Ry. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901; Gillingham *v.* Ohio River R. R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R A. 798, 29 Am. St. Rep. 827.

While the contract of carriage thus imposes a heavy responsibility upon the carrier, and reduces its defense to a narrow compass, when the action is for personal injuries inflicted by its servant, it is readily apparent and obvious that the passenger owes some duties to the carrier, which he cannot be allowed to omit. In contract law the antecedent failure on the part of one of the parties to perform what it is incumbent upon him to do, ordinarily justifies the other in refusing to perform his part. The doctrine of estoppel often forbids recovery by the plaintiff. In the law of negligence, the contributory negligence of the plaintiff bars recovery. On these principles or some of them, the courts, in a few instances, have refused to allow recovery for personal injury wrought by the servants of the company, because it appeared the plaintiff had provoked the assault upon himself by attacking the servant, indulgence in vulgar and pro-

fane language or other misconduct. These decisions do not, as a rule, attempt to specify any particular legal principle as constituting the basis of their rulings. However, they seem to treat the contract of carriage as having been broken by the conduct of the plaintiff, and the subsequent transactions between him and the servants as being purely personal to them and wholly outside of the contract of carriage. Thus, in Scott *v.* Railroad Co., 53 Hun (N. Y.) 414, 6 N. Y. Supp. 382, it was held error to refuse to charge the jury that if they believed the plaintiff had commenced the altercation between himself and the driver of a car, and, in the course of it, addressed indecent and insulting language to the latter, such as was calculated or likely to produce the assault, the verdict must be for the defendant. The court said the carrier must be responsible even for the willful act of the employees which resulted in a trespass against the passenger, but that the rule was not applicable when the trespass was brought about by the improper behavior of the passenger; and again that: "The carrier is bound to protect the passenger and the passenger, in order to entitle himself to such protection, is bound to behave himself in a decent and orderly manner."

In Harrison *v.* Fink (C. C.) 42 Fed. 787, the court said: "A passenger cannot claim damages on account of the conductor drawing a pistol on him, and speaking of him as a coward to the other passengers, if the conductor's conduct was provoked and caused by the acts of the passenger." In Little Miami R. R. Co. *v.* Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373, the court held the carrier not liable for the striking of a passenger by a baggagemaster under provocation, the use of threatening and abusive language. In these cases, or some of them, it is said the act of the servant was not within the scope of his authority or employment, wherefore there was no liability upon the carrier, but this reasoning does not extend to, nor take notice of, the obligation resting upon the carrier to protect the passenger from harm. It contracts to carry the passenger safely to his destination. It does not do so. One of its own servants injures him, and he is denied recovery because he is guilty of misconduct. His assault upon, or abuse of, the servant may obviously excuse the carrier from performance of his contract. It may eject him from its train, but it is difficult to see how this option on its part can excuse the beating of the passenger or the infliction of other injury upon him by way of punishment. This would be setting one wrong against another and would be retaliation, not remedy. Scott *v.* Railroad Co.; Railroad Co. *v.* Wetmore; Favre *v.* Railroad Co., 91 Ky. 541, 16 S. W. 370, and Peavy *v.* Railroad Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334, are the only cases, found so far, in which recovery has been denied on account of mere provocation. The proposition, asserted by them, varies from the general principles of

American law, governing the relations subsisting between passenger and carrier. Other cases, directly in point, declare the contrary. Railroad Co. *v.* Barger, 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319; Railway Co. *v.* Peacock, 69 Md. 257, 14 Atl. 709, 9 Am. St. Rep. 425; Steamboat Co. *v.* Brockett, 121 U. S. 645, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Railway Co. *v.* Fleetwood, 90 Ga. 23, 15 S. E. 778; Railroad Co. *v.* Flexman, 103 Ill. 546, 42 Am. Rep. 33; Bryan *v.* Railway Co., 63 Iowa, 464, 19 N. W. 295; Coggins *v.* Railway Co., 18 Ill. App. 620; Railway, etc., Co. *v.* Mullen, 138 Ala. 614, 35 South. 701; Railway Co. *v.* Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. In Harrison *v.* Fink, no bodily injury was inflicted. It was an action for damages for the humiliation, incident to abuse and threats on the part of the servant, superinduced by misconduct on the part of the passenger. It seems to us clear that provocation should always be admissible matter in mitigation of the damages, but cannot justify a wrong in a civil action any more than in a criminal prosecution, but this question does not arise and is not decided. Elliott on Railroads, § 1638, says: "It is not merely a question of negligence in such cases, nor is it strickly a question depending upon the scope of the servant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists, and a breach of that duty on its part whether caused by the willful act of an employee or not. A carrier is bound to discharge the implied duty, arising out of its contract and imposed by law, that its passengers shall be protected from injury by its servants and shall not be willfully insulted and harmed by them; and, if it commits the discharge of this duty to an employee it may well be held to do so at its peril, notwithstanding the exercise of care on its part in selecting its servants." This text is sustained by the great weight of authority, and our cases (Ricketts *v.* Ches. & O. Ry. Co. and Gillingham *v.* Ohio River R. R. Co.) are in perfect accord with it.

This doctrine is subject to one qualification, imposed by a general principle of law. A servant of a carrier, assaulted by a passenger, may use such force in resisting the same as is actually or apparently necessary to successfully repel it, but no more. The servant may rightfully do what his principal could do, if he were present and acting, and the measure of the right and duty of the former is, under these circumstances, the same as that of the latter. Self-defense, made within the limitations prescribed by law, is always permissible and never a violation of law. Hence it justifies resistance sufficient to repel the assault wherever and upon whomsoever made. Railroad Co. *v.* Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. But if the servant of a carrier, assuming to exercise this right, tran-

scends the limits thereof, in respect to an assault made upon him by a passenger, by the use of unnecessary force or violence, his principal is just as clearly liable for the injury done as the servant himself would be for the exercise of such excessive force, when acting in his individual capacity and not as a representative of the carrier. O'Brien *v.* St. Louis Trans. Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Haman *v.* Railroad Co., 35 Neb. 74, 52 N. W. 830. To the extent of the excessive force and violence exerted, the conduct of the servant is necessarily willful and without justification. Being unlawful, it imposes liability, and that liability falls upon the carrier because of its duty to protect the passenger from injury by its servant.

Having ascertained the legal principles, pertaining to the relation of passenger and carrier, it becomes necessary to determine the legal effect and operation of another factor in the case, namely, Howery's official position as a public officer. By becoming the servant of the defendant company, he did not lose that. He was then both servant and officer, acting sometimes in the one capacity and sometimes in the other. While engaged in the service of the company, he was more than a train or company servant. In respect to the operation of the train, he was, as servant, inferior to the other train servants, taking his orders from them, especially the conductor. As a public officer, his powers were much higher and broader than theirs. The conductor of a train performs very limited public functions and is hardly to be regarded as a public officer at all. Though he performs public functions, by authority of law, they are only such as enable him the more effectually to execute his powers as a railway servant. He is a conservator of the peace, but only "while in charge of" his train. Code, c. 145, § 31. A special officer, such as Howery was, is a conservator of the peace and possesses and may exercise "all the powers and authority" and is entitled "to all the rights, privileges and immunities" vested in or conferred upon regularly elected or appointed constables, and these rights, powers, privileges and immunities extend throughout every county, traversed by the railroad for which he was appointed, in which he has filed copies of his official oath. Statutes, conferring upon railway servants power to conserve the peace, are construed as only enlarging their powers as servants, and as not giving them the status of public officers (King *v.* Railroad Co., 69 Miss. 245, 10 South. 42); but statutes, authorizing the appointment of special constables, such as Howery was, provide for the creation of public officers, and the appointees have the status of other constables. Then, as Howery was both officer and servant of the defendant, we must apply the principles, first stated in this opinion, to determine in what capacity he acted in the transaction between him

and the decedent. If he acted as servant, and Layne was a passenger, and the killing was not justifiable, under the law of self-defense, the strict rule, adverted to, applies; but, even though Layne was a passenger, if Howery acted as a public officer, in vindication of public justice, the defendant is not liable. In some cases, the court can say, as matter of law, in which capacity such an officer and servant acted; in others, the question is one for jury determination. McKain *v.* Balt. & O. R. R. Co., cited.

The rejection by the court of several instructions offered by the defendant is complained of. One of these was to find for the defendant. It was, no doubt, asked under the impression that the plaintiff was precluded on one or all of three separate and distinct grounds: (1) That Howery plainly acted as a public officers in killing Layne; (2) that the decedent had precluded recovery by provoking the injury, even though he was a passenger and Howery acted as servant; and (3) that he was not a passenger, and, even though Howery was a servant of the company, the act, to which the killing was incident, was beyond the scope of his authority as such.

Howery's duties, as defined by a witness for the defendant, were to investigate all claims and robberies, perform any work directed by the agency by which he was employed, keep order on trains, when there, and perform police duty on trains necessary for the protection of passengers. Witnesses for the plaintiff testified to his frequent, almost constant, presence on the trains of the defendant company, and his enforcement of railway rules, relating to the conduct of passengers and his having made arrests on the trains for criminal conduct. He left the car in which he was riding, on the occasion of the shooting, at the instance of the porter, but there is no evidence that he was expressly directed, ordered or requested to arrest, assault or in any way molest, or interfere with, Robert Layne. The witness R. F. Adkins, who detailed what he saw very minutely, says the altercation between the porter and the Laynes had ceased when Howery came up, and Robert Layne had walked down the track "two or three steps and was looking up at the passengers on the coach, along up at the windows." That the controversy between the porter and Henry Layne had ceased when Robert Layne and Howery met is shown by the testimony of John Layne. The cross-examination on this point, perfectly consistent with the evidence in chief, was as follows: "Q. Howery was then walking toward the steps that Robert got off? A. Yes. Q. And when he met him that conversation you have detailed took place, and Howery struck him? A. Yes. Q. And then where were you and Henry Layne standing at that time? A. Well, I don't know where Henry was, but I was standing right there with Mr. Howery. Q. Henry had gone on up the

river? A. I don't know where he had gone. I didn't see him. Q. That was after the altercation about the ticket occurred, and Howery had put his gun in his pocket and turned back towards the coach, and met your brother and pulled it out again? A. He started up toward the upper end of the coach, and then when my brother Robert stepped off on the ground, he pulled the gun out of his pocket again." Andrew Conrad, an eyewitness of the fight, makes no mention of Henry or John Layne, in connection with the encounter between Robert Layne and Howery. Henry Ball says Robert and Howery were in the company of the other Layne boys when the fight occurred. Speaking of them, he said: "I didn't see either one; only later on I saw the other boys." C. E. Berger said when Howery came up at the call of Halo, the porter, he was informed by the latter that, "Everything is all settled," and Henry Layne had walked away before Robert came up. Henry Layne testified as follows: "Well, when I got off the train I got some six or seven steps up besides the car, and the porter hallooed, and says, 'Hold on! Give me your ticket!' and I says, 'I have no ticket,' and he says, 'You will pay me or Howery one,' and called for Howery. I asked the porter what was the fare and he said 15 cents, and I laid down my bundles and pulled off my gloves with my teeth and paid him 15 cents, and by that time Howery came up, and the porter says: 'It is all settled, Mr. Howery; it is all settled'—and he says, 'Have you paid your fare?' and I says, 'I have,' and he says, 'Go on then and attend to your own business,' and I walked off, and I had got around the depot and I heard a shot fired, and some one said Howery had shot Robert Layne, and I laid my bundles down and ran back, and Howery shot at me, and I grabbed the gun and wrenched the gun away from him and ran." Samuel Selby said Howery and all the Layne boys were together when the fight occurred, but makes no mention of the porter nor of the transaction between him and the Laynes. John Penix said Robert and Henry Layne and nobody else were with Howery when he first saw the latter. Neither he nor Selby heard any of the conversation with the porter. There is much evidence, however, that Howery resented Robert Layne's demand of a cash fare receipt for his brother, or rather his complaint to Howery of the failure of the porter to give one, and regarded this conduct, on Robert Layne's part, as indicative of an inclination or determination of the latter to make trouble for the defendant's servants in charge of the train, or pick a quarrel with the officer himself. No doubt Layne left the car, under the belief that trouble between Howery and his brother was likely to occur, and for the purpose of rendering the latter assistance, or possibly to join the brother in an assault upon the officer. Testimony was introduced to the effect that, before alighting from the car, he had expressed himself vindictively

toward Howery, saying, among other things, he was not afraid of his gun and would demonstrate that he was too cowardly to use it. He did not go off of the company's premises. The altercation between him and Howery and the fatal shooting occurred right by the side of the train. Moreover, on departing from his seat, he left some packages there, containing articles purchased at Charleston, which he was taking home.

We are of the opinion that the capacity in which Howery acted was a question proper to be submitted to the jury under the circumstances disclosed by the evidence. As we have said, his employment by the company was established, though it was indirectly procured through the detective agency. As such servant, he customarily enforced or aided in the enforcement of the rules and regulations of the defendant. On the occasion of the killing, he responded quickly and eagerly to the call of the train porter, when it was supposed his services would be needed for the purpose of enforcing payment of chair car fare. The evidence leaves it uncertain, and a question for the jury, whether Layne, at the time he was killed, had committed any breach of the peace or done any unlawful act for which he could have been arrested. According to the testimony of the witnesses for the plaintiff, he had not behaved in a riotous or disorderly manner or done any other unlawful act. He had merely asked what was the matter and demanded a receipt for the chair car fare paid by his brother. Of course this was contradicted by the testimony of witnesses, introduced by the defendant, and the almost ever-present question of credibility of witnesses was involved.

Assuming that the decedent was a passenger, and that Howery had acted as servant, principle above stated make the defendant liable, notwithstanding the provocation offered by the decedent. Hence recovery was not necessarily precluded by such provocation. We have already seen that misconduct on the part of a passenger, tending to provoke an assault upon himself by a servant, does not destroy the contract of carriage, nor relieve from its obligations. A recalcitrant or abusive passenger retains his status as such; and, even though he assault a servant, the latter is not thereby justified in using more force than is necessary to repel it. The evidence tending to show that the killing was done in self-defense went to the jury. It was conflicting. That introduced by the plaintiff amply justified a finding in his favor if the jury believed it, while that introduced by the defendant might have justified a finding for it if it had produced conviction on the minds of the jury. Hence it is quite clear the instruction could not have been given on the theory of justification or exoneration by provocation.

If the contract of carriage had, for any reason, been terminated, the strict rule of liability in favor of passengers does

not apply. This is so obvious as to require no citation of authority to sustain it. Circumstances sometimes render it doubtful as to whether the injured party is a passenger. There are many ways in which one loses his right to be treated as a passenger. "The relation of carrier and passenger, having been constituted, continues until the journey, expressly or impliedly contracted for, has been concluded, and the passenger has left the carrier's premises, or until a reasonable time has elapsed after arrival at the point of the passenger's destination in which to afford him ample opportunity to depart from the carrier's premises, unless the passenger has relinquished his rights as such by some act or misconduct of his own, such as a refusal to pay fare, refusal to produce a ticket, failure to have his ticket stamped, detaching coupons, attempting to use an invalid ticket, or refusing to comply with the reasonable rules of the carrier." 5 A. & E. Enc. Law, 497. A passenger does not, however, lose his status as such by merely alighting at a regular station for exercise, for lunch, or for any business not inconsistent with the pursuit of the journey contracted for. Parsons *v.* Railroad Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450; State *v.* Railroad Co., 58 Me. 176, 4 Am. Rep. 258; Dice *v.* Transportation Co., 8 Or. 60, 34 Am. Rep. 575; Packet Co. *v.* True, 88 Ill. 608; Railroad Co. *v.* Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; Dodge *v.* Steamship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Railroad Co. *v.* Shean, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; Railroad Co. *v.* Riley, 39 Ind. 568. It has been held, however, that if a train merely stops to allow other trains to pass, and a passenger leaves it without objection made or notice given, he surrenders his place as a passenger for the time being, although he does no illegal act. State *v.* Railroad Co., 58 Me. 176, 4 Am. Rep. 258; De Kay *v.* Railroad Co., 41 Minn. 178, 43 N. W. 182, 4 L. R. A. 632, 16 Am. St. Rep. 687. Perhaps these cases mean no more than that the passenger, under such circumstances, is guilty of the negligence which causes his injury. They are cases in which the injuries were not inflicted by affirmative or willful acts of servants of the company. The failure of duty, charged against the carriers, related to means of egress and ingress, and failure to give due notice of the starting of the trains from which the passengers had temporarily alighted. In other words, they seem to be pure negligence cases, the liability depending upon questions of negligence on the part of the carriers and contributory negligence on the part of the passengers. Other similar decisions are Finnegan *v.* Chicago, etc., Ry. Co., 48 Minn. 378, 51 N. W. 122, 15 L. R. A. 399; Buckley *v.* Old Colony Ry. Co., 161 Mass. 26, 36 N. E. 583; Allerton *v.* Boston, etc., Ry. Co., 146 Mass. 241, 15 N. E. 621; Cincinnati, etc., R. Co. *v.* Carper, 112 Ind. 26, 13 N. E. 122, 14

N. E. 352, 2 Am. St. Rep. 144; Drew *v.* Central, etc., R. Co., 51 Cal. 425; Knight *v.* Portland, etc., R. Co., 56 Me. 234, 96 Am. Dec. 449; King *v.* Central R. Co. of Ga., 107 Ga. 754, 33 S. E. 839; Abbot *v.* Oregon, etc., R. Co., 46 Or. 549, 80 Pac. 1012, 1 L. R. A. (N. S.) 851, 114 Am. St. Rep. 885; Hendrick *v.* Chicago, etc., R. Co., 136 Mo. 548, 38 S. W. 297; Chicago, etc., R. Co. *v.* Sattler, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666; and Conroy *v.* Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486, 38 L. R. A. 419. The last two of these are specially relied upon in the brief for plaintiff in error, but they do not sustain its position. In the Sattler Case, the court held the plaintiff's decedent not to have been a passenger within the meaning of a certain statute. In the other, recovery was denied on the ground of contributory negligence, and the court held the carrier bound to only ordinary care, under the peculiar circumstances, but it distinctly declared the relation of carrier and passenger had not ceased. It was a case of injury by an explosion of a burning oil tank, which the plaintiff, leaving a temporary station, had approached from motives of curiosity or pleasure.

Instructions Nos. 2, 3, 9, and 11, requested by the defendant, were all properly rejected. They pertain to Howery's status as a public officer; their object being to tell the jury that, if they should find from the evidence he was such an officer at the time of the shooting, there was no liability upon the defendant for his act, or that he was presumed to have acted as a public officer and not as a servant. Nos. 2, 9, and 11 propounded the first of these theories and No. 3 the second. That Howery was a public officer at the time of the killing was not, as we have shown, any defense. It was only a fact which cast upon the plaintiff the burden of proving the additional fact of servantcy. Prima facie an officer is not a servant. If the plaintiff would fix liability upon another for his act, he must prove the relation of master and servant. That he was a public officer is beyond question, but it does not follow that he was not also a servant nor that he acted as a public officer and not as a servant in the transaction to which the killing was incident. The real issue was whether Howery acted on behalf of the company or the public in the transaction between himself and Layne in which the latter was incidentally killed. At the time of this transaction he was both officer and servant, and, in general, acting as such. The jury question was the capacity in which he acted in that particular transaction. None of these instructions propounded that question. Each of them would have tended to becloud the issue and mislead the jury. Instruction No. 3 was intended to tell the jury that Howery, in endeavoring to arrest Layne, must be presumed to have acted in his official capacity, notwithstanding they may have found that he had been before that time a

servant of the defendant. This instruction was calculated to mislead in this: That it ignored the theory of servantcy on the part of Howery at the time of the killing. It also assumes that he was endeavoring to arrest Layne at the time. Whether he was endeavoring to do so was an open question, to say the least of it. Instruction No. 8 was properly rejected. It would have told the jury that, under the evidence in the case, Layne was not a passenger at the time of the altercation which resulted in his death. What has already been said makes this obvious. Instructions Nos. 5 and 6 were so framed as to tell the jury the plaintiff could not recover, if they should find Layne had left the car for the purpose of engaging in a quarrel with Howery or assaulting him, and was killed in an altercation so brought about. The court refused, but modified, them so as to say he could not recover. If Layne left the train for the purpose of unlawfully or improperly engaging in such altercation. Enough has been said on this subject to show that the court did not err in rejecting these instructions in the form in which they were prepared. Their propriety, as modified and given, is not questioned; wherefore we are not called upon to say whether it was proper to give them as modified.

Instructions Nos. 4 and 10 were intended, respectively, to submit the following propositions: (1) If the jury should find that Howery committed the assault upon Layne at a time when he was acting for himself and as his own master, the defendant was not liable; and (2) if Howery, although found to be a servant of the defendant at the time of the killing, acted beyond the scope of his duties as such servant, the defendant was not liable. The first of these was properly rejected. It would have been misleading. If Howery, while a servant, acted for himself, or rather for purposes of his own, in assaulting a passenger, the company would be nevertheless liable. If the instruction had been so framed as to submit to the jury the question whether Howery was acting for and on behalf of the defendant company, and not in his capacity as a public officer, it would have been free from this objection. As prepared, it was too narrow, leaving it open to the jury to say that, even though he was, as a servant, enforcing a rule and regulation of the master, he could have assaulted Layne by way of revenge for some insult, or out of vindictiveness, without making the defendant company liable. For the same reason, the court properly rejected instruction No. 10. It would have directed the jury to inquire only as to whether the killing was within the scope of the servant's duty. The killing was only an incident of what transpired. Unless done in self-defense, it was necessarily beyond the scope of the duty of any servant and wholly unjustifiable. The court should have directed the jury to inquire as to the capacity in which Howery was acting when

he inflicted the mortal wound. This instruction would have been palpably misleading.

Objection is made to the giving of plaintiff's instruction No. 1, but no fault in it is pointed out in any of the assignments of error. Our examination of it reveals none.

Evidence tending to show the election and qualification of Howery as a regular constable of Kanawha county was offered and rejected, and this ruling of the court is complained of. This, no doubt, was proper evidence, but the defendant was not prejudiced or injured by the rejection thereof, for the reason that Howery's status as a public police officer was otherwise established.

On cross-examination, the attorney for the defendant asked what office, if any, Howery filled or occupied in Kanawha county at the time of the shooting. The objection to this was properly sustained. It was evidence in chief, for which the witness should have been called by the defendant, if it desired to prove the fact by him. State *v.* Carr, 65 W. Va. 81, 63 S. E. 766. Besides, there is no intimation as to what the witness would have said in response to the question.

The court overruled an objection made to the following question propounded to plaintiff's witness in reference to Howery: "Don't you know he had been police officer for the Chesapeake & Ohio Railway Co. since that time?" The subject-matter was proper. The witness testified that he had frequently seen Howery ride on the trains of the defendant, both passenger and freight, and make arrests on local freight trains, before the killing of Layne. These were circumstances tending to show Howery's connection with the defendant in a special capacity. The question was objectionable in form, but the court had discretion to allow it, in view of evasion and reluctance on the part of the witness. State *v.* Carr, cited.

The petition for a writ of error contains an assignment of error relating to the testimony in chief of the witness Sam Selby, introduced by the plaintiff, but the record shows no objection, ruling or exception relating thereto. On cross-examination the defendant propounded to the same witness several questions, for the purpose of proving by him that Howery was a constable of Kanawha county, to all of which objections were sustained. This is evidence that ought to have been introduced, if competent, by calling the witness to testify on behalf of the defendant.

The witness John Layne was permitted to say, over the objection of the defendant, that he did not resume his journey on the train after having gotten off at Malden, because "They [meaning somebody connected with the train] hit me with blackjacks and run me from the train." This ruling of the court was excepted to, and afterwards there was a motion to exclude the

evidence, which the court overruled, but it directed the jury not to regard the statement of the witness that he was driven from the train, nor any violence inflicted on him, in arriving at their verdict or in the trial of the issue, except as a reason why the witness did not pursue his journey. If the evidence was improper, this instruction to the jury rendered it utterly harmless.

Perceiving no error in the judgment, we affirm it.

BARDEN *v.* ATLANTIC COAST LINE RY. CO.

(Supreme Court of North Carolina, April 13, 1910.)

[67 S. E. Rep. 971.]

Master and Servant—Injuries to Servant—Railroad Relief Department—By-Laws.*—Rules and regulations of a railroad's relief department, exempting the railroad company from liability to members for injuries resulting from the railroad's negligence, as a condition precedent to the member's right to benefits from such department, were void.

Charities—Railroad Relief Department—Malpractice—Negligence of Surgeon.†—Eliminating as invalid regulations of a railroad's relief department, exempting the railroad from liability for negligent injuries received by its employees as a condition of the employees' right to benefits from the relief department, maintained by contributions of employees and the railroad company, such department constituted a charity, and hence the railroad company was not liable for the negligence or malpractice of surgeons and attendants employed therein, in the absence of proof of negligence in their selection.

*For the authorities in this series on the subject of the effect of the acceptance by an injured railroad employee of relief department benefits on the right to recover against his master for his injuries, see foot-note of Sturgiss *v.* Atlantic C. L. R. Co. (S. Car.), 29 R. R. R. 447, 52 Am. & Eng. R. Cas., N. S., 447; last foot-note of Harrison *v.* Alabama Mid. Ry. Co. (Ala.), 25 R. R. R. 511, 48 Am. & Eng. R. Cas., N. S., 511.

For the authorities in this series on the subject of the release or limitation by contract of master's liability for negligence, see first foot-note of Chicago & E. R. Co. *v.* Lawrence (Ind.), 28 R. R. R. 504, 51 Am. & Eng. R. Cas., N. S., 504; last foot-note of Pugmire *v.* Oregon Short Line R. Co. (Utah.), 27 R. R. R. 660, 50 Am. & Eng. R. Cas., N. S., 660; foot-note of Dugan *v.* Blue Hill St. Ry. Co. (Mass.), 26 R. R. R. 159, 49 Am. & Eng. R. Cas., N. S., 159; first foot-note of Hoxie *v.* New York, etc., R. Co. (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537.

†For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see first foot-note of Phillips *v.* St. Louis, etc., R. Co. (Mo.), 30 R. R. R. 696, 53 Am. & Eng. R. Cas., N. S., 696.

Appeal from Superior Court, Columbus County; Lyon, Judge.

Action by N. F. Barden against the Atlantic Coast Line Railway Company. From an order overruling defendant's demurrer to the complaint, it appeals. Reversed.

The plaintiff complains that while he was an employee of the defendant, he was taken sick and was received into the hospital of the relief department of the defendant at Rocky Mount, to be there operated upon and attended to. That the operation was performed, and through the neglect and inattention and carelessness of the surgeon, nurses, and attendants, he was permanently injured, and demanded damage for his suffering and injury. The plaintiff alleges, further, that he was entitled to admission into the hospital because he was a member of the relief department, under a certificate issued to him, as follows: "Atlantic Coast Line Railroad Company. Relief Department. Certificate of Membership in the Relief Fund. No. 5282. Office of the superintendent, Wilmington, N. C. 19 Sept. 1902. This certifies, that N. F. Barden, employed by the Atlantic Coast Line Railroad Company, is a member of the relief fund of the relief department of the Atlantic Coast Line Railroad Company, and is entitled to the benefits provided by the regulations of the relief department for a member of the ——— class, with ——— additional death benefit of the first class. ———, Superintendent of the Relief Department." That plaintiff was operated on in May, 1906. That he had paid since his membership, 75 cents per month; that this amount was retained out of his wages by the defendant. The rules and regulations of the relief department are attached to the complaint. The following is a summary of the principal rules and regulations, which are as follows:

It is a department of the defendant company's service. Rule 1. It is in charge of a superintendent and a chief surgeon, whose directions in carrying out these regulations are to be complied with, subject to the control of the defendant company's president. Rule 1. The said president appoints the superintendent, assistant superintendent, and the chief surgeon. Rule 11. It has an advisory committee (rule 5), of which the defendant company's general manager is ex officio a member, and the chairman, with 12 other members, of whom 6 are selected by the defendant company's board of directors and 6 by the contributing employees, insuring the control of this advisory committee to the defendant company by a "safe majority." The functions of this committee, controlled by the defendant company, is to "have general supervision of the operation of the departments, and see that they are conducted in accordance with the regulations." Rule 8. This advisory committee may propose amendments to the regulations, but no amendment becomes

operative until adopted by a majority of the whole committee, and it is approved by the board of directors of the defendant company. Rule 16.

The superintendent, who is appointed by the defendant company's president, shall have charge of the business pertaining to the department, employing subordinates, certifying pay rolls or bills, signing orders for payment of benefits, etc., and exercising such other authority as may be conferred upon him by the president of the defendant company. Rule 9. Its members are limited to employees of the defendant company. Rule 17. Its funds are derived from their contributions. Rule 3. If there should be a deficit in these contributions, then, only, the company advances the money for its operations, charging 4 per cent. interest, and reimbursing itself out of the funds contributed by the employees. Rule 14. It pays 4 per cent. on the monthly balances, which may be in its hands derived from this fund, it is true, but the company is the trustee, and it administers the trust funds. Rules 4 and 13.

If a member of this relief department is furloughed, suspended, or otherwise temporarily relieved from defendant's service for a specified time, he may retain his membership, during such absence, by paying his contributions in advance; but, if at the time specified by his division officer he does not return to his duty in the service of the company, his membership in the relief fund shall thereupon terminate. Rule 29. When a member resigns from defendant company's service, or leaves it without notice, is relieved or discharged therefrom, his membership in the relief fund terminates with his employment, and he shall not be entitled to any benefits for time thereafter, except he continue his membership only in respect of the minimum death benefit, if applied for within five days. Rule 30. If a member absents himself from the duty of the defendant company for six days, without permission previously obtained, or without satisfactory reasons to his employing officer, he is deemed to have left the defendant's service without notice, and his membership in the relief fund terminates. Rule 31. If a member reported by a medical examiner as able to work fails to report for work at the time set, he must obtain a written furlough from his employing officer; otherwise his relief fund membership ceases. Rule 32.

The employee must make written application for membership in the relief fund. Rule 34. In this application, set out in rule 34, he is to state he has read or had read the regulations of the department, accepts them, together with subsequent changes or amendments, and accepts any agreement "now or hereafter made by the said company with any corporation or corporations now or hereafter associated with it in the administration of their relief departments." He agrees that the company may

retain the stipulated contributions from his wages to be applied to the relief fund, and his agreement to do so shall constitute an assignment in advance for such portions of his wages to the said company in trust. He also agrees that, if transferred to the service of any other company associated with the said company in the joint operation of their relief departments, it shall operate to transfer his membership in the relief department of such other company. Rule 34.

It is further provided that "contributions for any month will be due on the first of that month, and ordinarily be deducted from the member's wages on the pay roll of the preceding month," but when a member has no wages on the pay roll, any contribution due from him must be paid in cash in advance, otherwise he will be in arrears. Rule 40. The benefits from this relief fund "shall not be due on account of disability beginning, or death occurring while a member is in arrears, and when in arrears for two months, his membership shall thereupon cease." Rule 41.

It is provided by rule 49 how much shall be paid in the nature of benefits—to a member of the first class, 50 cents per week, second class, $1, third class, $1.50, fourth class, $2, fifth class, $2.50, and at half these rates during the continuance of disability; but these sums are not paid for a longer period than 52 weeks. It is also provided by this rule (49) that provisions shall be made by the department, in addition to the benefits allowed, "for necessary surgical attendance, or, when such provision is not made, payment in behalf of the member of such bills for surgical attendance as are authorized and approved by the chief surgeon." There is likewise a provision that, in case of sickness, he shall have the same benefits. Rule 49. It is also provided by this rule (49) that "disabled members must take proper care of themselves and have suitable treatment; benefits will be discontinued if members refuse or neglect to comply with the recommendations of the medical officers of the relief department as to the proper care and treatment."

Certain death benefits are provided by rule 49. All of these "benefits are to be paid in conformity with the financial methods of the company, and on orders drawn by the superintendent, upon his receiving satisfactory certificates respecting the claims and such releases as may be required by him."

"When a member resigns from the service, or leaves the service without notice, or is relieved or discharged therefrom, his membership in the relief fund shall terminate with his employment, and he shall not be entitled to any benefits for time thereafter."

In the revised regulations (Exhibit B, p. 30) rule 47 provides: "Payment for each day, except for the first six days of disability classed as due to sickness, for a period not longer than

fifty-two weeks, at the same rates as for accident benefits; and provision by the department for free medical treatment of the member, in one of the hospitals under its control, in cases of disability, classed as due to sickness which, in the opinion of the medical examiners of the department, may require such treatment, and when approved by the superintendent or chief surgeon."

Extract Regulations—No. 64.

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member, no part of the death benefit shall be due or payable, unless and until good and sufficient releases shall be delivered to the superintendent, of all claims against the relief department as well as against the company, and all other companies associated therewith as aforesaid, said releases having been duly executed by all who might legally assert such claim; and further, if any suit shall be brought against the company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company, created by the membership of such member in the relief fund, shall thereupon be forfeited, without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

"If a claim for damages on account of injuries shall be settled by the company without suit, such settlement shall release the relief department and the company from all claims for benefits on account of such injuries."

Extract—Regulation No. 65.

"All claims of members, or of their beneficiaries or other representatives, for benefits, and all questions or controversies of whatsoever character, arising in any manner or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language, or the meaning of regulations, or as to any writing, decision, instructions or acts, in connection with the operation of the department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless a written appeal from his decision is made to the committee.

"If the party or parties so submitting any matter to the superintendent shall be dissatisfied with this decision, such party

or parties shall appeal to the committee, within thirty days, after notice, to the parties interested of the decision of the superintendent.

"When an appeal is taken to the committee, it shall be heard by said committee without further notice, at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties without exception or appeal."

Extract from Application Agreement Required.

"I also agree that in consideration of the amounts paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payments of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief department for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said relief department, of all claims against said relief department, as well as against said company, and all other companies associated therewith as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company, created by my membership in said relief fund, shall thereupon be forfeited without declaration or other act by said relief department or said company."

Extract Revised Regulations (Exhibit B, p. 19).

"I also agree, for myself and those claiming through me, to be especially bound by the regulation providing for final and conclusive settlement of all claims for benefits or controversies of whatsoever nature, by reference to the superintendent of the relief department; and an appeal from his decision to the advisory committee."

The defendant demurred to the complaint upon the following grounds: "(1) It does not allege that the defendant did not use reasonable care and diligence in the selection and employment of the surgeons, nurses, and attendants in the hospital, at the time alleged in the complaint, when plaintiff was in said

hospital for surgical care and attention. (2) That it does not allege that the defendant knew that the said surgeons, nurses, and attendants, or any of them, were incompetent or careless, or that it retained them, or any of them, after knowing that they were incompetent, or having grounds to believe they were incompetent. (3) That it does not allege any negligence on the part of the defendant in the selection or employment of any of the said surgeons, nurses, or attendants, or in retaining them after it knew they were incompetent, or had good reasons to believe they were incompetent."

Geo. B. Elliott, Davis & Davis, and *J. B. Schulken,* for appellant.

D. J. Lewis and *Mcares & Ruark,* for appellee.

MANNING, J. The defendant company owns and controls and operates several thousand miles of railroad in this and other states. It has established, in this state at least, a relief department, in which only its employees are admitted as members, and in which they can remain as members only so long as they continue to be employees. As members, they are required to contribute each month a fixed amount, regulated by the monthly pay; the lowest paying 75 cents per month, and the highest $8.25 per month, according to the benefits to be received, which range from $250 to $5,000. The membership is based upon an application signed by the employee, and the applicant agrees to be bound by the rules and regulations of the relief department; that the company shall apply the stipulated amount each month from his wages "for the purpose of securing the benefits provided in the regulations for a member of the relief fund;" further, the applicant agrees "that, in consideration of the amount paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefit, the acceptance by me of said benefits shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient release shall be delivered to the superintendent of said relief department, of all claims against said relief department, as well as against said company and all other companies associated therewith, as aforesaid."

In our opinion, it becomes necessary to determine the validity and effect of the agreement, in order to fix the character of the relief department of the defendant, whether it is an agency or an association, with only benevolent aims and purposes, or a mere agency created by the defendant to serve, under the cloak

of charity, the purpose of avoiding liability for negligent injuries received by its employees. The concluding sentence of section 2646, Revisal, known as the fellow-servant act, is in these words: "Any contract or agreement, express or implied, made by any employee of such company to waive the benefit of this section shall be null and void." The authorities agree, without dissent, that all contracts made by railroad companies to avoid liability for their own negligence, are void. There is, also, a unanimity of decision that, if the agreement made by the employee, upon entering the relief department, is a contract by which the railroad company undertakes to stipulate against liability for its own negligence, then all such stipulations are void. Some courts, however, as Pennsylvania, Maryland, Iowa, South Carolina, Indiana, Georgia, construe the agreement as giving the injured employee an election or choice of remedies; either to accept the benefits, or to bring his action for damages. These courts also hold that it is not the stipulation made in advance that is effective, but the acceptance of benefits after the injury, that constitutes the release of the company and bars the action for damages. We have read with care and attention the opinions of the learned courts that have considered this question, and have given to them that attentive consideration which their learning and high standing demand that they should receive from us. Their conclusions are but persuasive upon us; the question has not been passed upon by this court, and is an open question. After giving the matter that careful consideration its importance requires, we have reached the conclusion which we now express.

The relief department of this defendant has been declared by this court, in Nelson's Case, 147 N. C. 103, 60 S. E. 724, to be a mere agency of the defendant; it is not incorporated, and has no separate entity, but it is, in fact, "a bureau or department" of the defendant company, not having the capacity to sue or be sued. The employees of the defendant company contribute of their monthly wages to this department; the defendant handles the money, and is responsible for its safekeeping; it agrees to pay 4 per cent. on monthly balances, and guarantees the payment of the benefits accruing by the regulations to its members. It, likewise, contributes to this department; it is potent in its management and control, and in the selection of the surgeons and physicians. If an employee of the company is injured by negligence, why should he be required to stipulate in advance that he must choose between a forfeiture, on the one hand, of all benefits which accrue to him under the rules and regulations of the department to which he has contributed each month, and, on the other hand, his right of action, of which he cannot be deprived by any agreement, express or implied? For whose benefit is this choice of

remedies to be made? Certainly not for that injured employee, who has, during each month of his membership, been contributing of his earnings in order that the benefits of the department may be his in time of need. Why should he be forced to elect for the sole benefit of that contributor to this department, who receives and manages its funds, even though its contributions to it largely exceed those of any other contributor? It is not the obvious purpose of the company to place its employees, who may be negligently injured, in the position to forego the benefits of an association which they have helped to create, or to take the chance of a suit with it for damages in the courts, with its attendant annoyances, delays, and uncertainties? What doth it advantage the employee? Is not all the benefit to the company? This choice of remedies is to be made only by those employees whose injuries or death are caused by the negligence of the defendant. Upon no other contingency is the employee forced to choose; in no other contingency is he confronted with an election of remedies, nor is he under the compulsion of choice. Further, those who are injured or killed by negligence can receive no benefit stipulated in the rules and regulations, "unless and until" a complete release of the action for damages is properly executed. Such is the compulsion of the stipulation; such is the "letter of the bond." The election of remedies originates in and is predicated upon this stipulation. In our opinion, this stipulation is an ingenious scheme devised by the company to avoid responsibility for its negligence, and, as such, is inequitable and void. Such would seem to be the view of the federal Congress, by its adoption, in 1906, of the following enactment (Act June 11, 1906, c. 3073, § 3, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1149]), approved June 11, 1906: "No contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity, by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of, such employee. Provided, however, that upon the trial of such action against any common carrier, the defendant may set off therein any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative." And by the adoption by Act April 22, 1908, c. 149, § 5, 35 Stat. 66 (U. S. Comp. St. Supp. 1909, p. 1173), of the following enactment: "That any contract, rule, regulation, device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier, under or by virtue of any of the provisions

of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity, that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Eliminating, therefore, this regulation and stipulation as void, we have then a relief department or association, supported by the mutual contributions of employee and employer, maintained for the sole purpose of relieving and mitigating the suffering of its members—a charity whose noble purposes are untainted by selfish interest—or, to quote the definition of Gray, J., in Jackson *v.* Phillips, 14 Allen (Mass.) 539, we have a charity which, "in the legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Fire Patrol *v.* Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745. With the character of the relief association thus defined, what is the extent of the duty of the defendant in selecting the physicians and surgeons and attendants who perform the offices cast upon them in their respective positions?

The law is well settled that the only duty imposed upon the defendant is the duty to exercise reasonable care in the selection of the physicians and surgeons who are reasonably competent, and, having exercised this duty, the company is not chargeable with the want of skill of the physician or surgeon whom it has selected, in the performance of the service he is required to render. 3 Elliott on Railroads (2d Ed.) § 1388; Railroad Company *v.* Zeiler, 54 Kan. 340, 38 Pac. 282; U. P. R. R. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; Powers *v.* Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; Maine *v.* Railroad, 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; York *v.* Railroad, 98 Iowa 544, 67 N. W. 574; Quinn *v.* Railroad, 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767; Railroad *v.* Price, 32 Fla. 46, 13 South. 638; McDonald *v.* Hospital, 120 Mass. 432, 21 Am. Rep. 529; Laubheim *v.* N. S. Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815; Allan *v.* S. S. Co., 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. Rep. 556; O'Brien *v.* S. S. Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Railroad Company *v.* Sullivan, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313; Haggerty *v.* Ry. Co., 100 Mo. App. 424, 74 S. W. 456; Perry *v.*

House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; Downes *v.* Harper Hospital, 101 Mich. 55, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; Fire Patrol *v.* Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Parks *v.* Northwestern Univ., 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556; Railroad *v.* Howard, 45 Neb. 570, 63 N. W. 872. We find no allegation of such negligence of the defendant in the complaint—the negligence complained of—and the sole theory of the complaint is the malpractice of the surgeon and his attendants, but it is nowhere alleged that these were carelessly or negligently selected by the defendant, or, if they were incompetent, that such incompetency was known to the defendant. We think the allegation of such negligence material, and that the complaint, in failing to contain it, is demurrable. We conclude there was error in overruling the demurrer, and the judgment is reversed, and the action will be dismissed, unless the plaintiff shall obtain leave to amend the complaint from the judge before whom the motion shall be made.

Reversed.

BROWN, J. While I concur in the result, I cannot agree to all that is said in the opinion of the court. The facts are that the plaintiff was a member of the relief department of the defendant, and voluntarily went to its hospital to be treated for a fistula, brought on from natural causes, and in no sense an injury received by reason of the negligence of the defendant or its employees.

1. It would seem, therefore, that the court has unnecessarily and improperly declared section 64 of the regulations of the relief department void. The court has done this of its own motion, and not at instance of either party. The learned counsel for both plaintiff and defendant admitted that section 64 was a valid and binding regulation upon the parties to this record. If this plaintiff, having been injured by the negligence of the defendant, had sued to recover damages, and defendant had pleaded in bar of a recovery that the plaintiff had elected to take the benefits of the relief department, offered by it in lieu of damages, then the validity of section 64 would be squarely before the court. But, as it is not claimed by plaintiff that the defendant is in any way responsible for the existence of the fistula, I am constrained to think that the validity of section 64 is not presented upon this appeal, and that the observations upon it are to be regarded as purely obiter dicta.

2. I am of opinion that section 64 is not void as against public policy as a scheme devised by defendant to avoid the consequences of its own negligence. The act of Congress referred to by the court has no bearing whatever upon this case, as it appears upon the pleadings to be a matter wholly under the

jurisdiction of this state, and in no particular within the domain of federal legislation regulating interstate commerce. Besides it makes the employee, when holding the company liable for negligence, account for all he may have received from the relief department. Section 64 does not enable the defendant to avoid the consequences of its own negligence.

The whole scheme of the relief department is founded upon a policy that considers the welfare of the employees as well as of the employer. While the member pays certain annual dues, which are very small, the company bears by far the heaviest portion of the expense of maintaining the department. Its benefits are not confined to free hospital service, but embraces pay for 52 weeks if disabled so long. All the employees of the company may take its benefits, whether disabled in the company's service or ill from other causes. The insurance feature is a most valuable one to the employee. And if an employee is injured in the company's service, he is not denied the right to sue the company for damages. That right is expressly reserved to him. But he cannot take the benefits conferred by the relief department in case he does sue for damages. No principle of public policy requires that the injured employee should be permitted to take both. If he is sick from natural causes, he has the right to seek aid from the relief department. If he is injured in the service of the company, he is entirely free to sue for damages, as much so as if no relief department existed. Under existing conditions the injured employee may take whichever course he thinks is to his interest, whereas before he was confined to one.

If in a helpless or unconscious condition from sudden injury he is involuntarily carried to the hospital, no court would hold it to be an election, and it would be no bar to his action. The acceptance to bar recovery must be under circumstances when the injured employee has capacity to decide for himself. It seems that my learned Brethren have not been able to fortify their opinion with any authority, as the case quoted from 14 Allen bears on a bequest in a will for charitable purposes. On the other hand it appears that this identical relief department is no new thing in this country. It has worked well for employees and employer for 30 years or more, and is common to nearly all the great railway systems of this country and Canada. The validity of section 64 has been upheld by text-writers and nearly all the courts of the Union. My Brethren are setting up their personal opinions against the collective wisdom and well-considered judgments of over a hundred judges of the ablest courts in our land, as well as in Canada. All the text-writers agree with Judge Thompson that the validity of this provision of the relief department of railways has been so well settled that it is not open to question. Thompson on Neg., §§ 3853-4635.

While novel in this state, the validity of this contract has been supported by the highest courts of New York, Pennsylvania, Maryland, Indiana, Iowa, Nebraska, Ohio, Illinois, West Virginia, New Jersey, South Carolina, Georgia, Alabama, and also by the federal courts of appeal in the Fourth, Fifth, Sixth, Seventh, and Eighth circuits. I quote from a few of the opinions. In Petty *v.* Railroad, 109 Ga. 666, 35 S. E. 82, the court, speaking through Justice Lumpkin, states the case with great clearness: "The contract does not in any of its terms or conditions stipulate that the defendant company should be absolved from the legal consequences of its own negligence or that of its servants. On the contrary, it merely provides an additional remedy to that given by law to an employee who might suffer injury by reason of the negligence, actual or imputable, of his master. The latter remedy was left intact, undisturbed, and unimpaired, and the injured employee might or might not, at his option, take advantage thereof. True, he could not avail himself of both, but was put upon his voluntary election as to which of the two he would pursue. This feature of the contract is not only technically permissible, but is in perfect harmony and accord with the fundamental rule of law, based upon sound and sensible considerations of public policy, which contemplates that indemnity, rather than the mere chance of speculative gain, should be the primordial purpose of every contract designed to afford protection to the party thereto, in the event he sustains loss." Approved in Carter *v.* Brunswick & W. R. Co., 115 Ga. 853, 42 S. E. 239. In Lease *v.* Penn. R. R., 10 Ind. App. 47, 37 N. E. 423, the Appellate Court of Indiana says: "There is no rule of public policy which condemns an arrangement between an employer and his servants, looking to compromises of claims for damages, and a system of general mutual relief for servants, and their families." So, also, is C., B. & Q. R. R. Co. *v.* Bell, 44 Neb. 44, 62 N. W. 314; Eckman *v.* C., B. & Q. R. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Fuller *v.* B. & O. Emp. Rel. Assoc., 67 Md. 433, 10 Atl. 237; C., B. & Q. R. R. Co. *v.* Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Maine *v.* C., B. & Q. Ry. Co., 109 Iowa, 269, 70 N. W. 630. In the case of Railroad *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638, the court said: "It is nothing more nor less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction." The Iowa courts said substantially the same thing, and that the contract was mutual and violated no principle of public policy. As said by the Supreme Court of Pennsylvania in Johnson *v.* Railway, 163 Pa. 127, 29 Atl. 854: "The employee is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused

thereby." The same court well says: "The substantial feature of the contract, which distinguished it from those held void as against public policy, is that the party retains whatsoever right of action until after knowledge of all the facts and an opportunity to make his choice between the sure benefit of the association and the chances of litigation, and, having accepted the former, he cannot justly ask the latter in addition." To same effect speaks the Ohio court. Railroad *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507. In the Indiana case (Railroad *v.* Moore, supra) the court, reviewing the authorities, says: "Indeed the cases seem to be in substantial accord." The Ohio court, in State ex rel. Sheets *v.* Railroad, 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635, sustaining the identical section now under consideration, said: "The cases form a uniform current of judicial opinion. We have not been cited to a single case holding a contrary view, and our research has not been rewarded with one. We think the tide of judicial opinion is irresistible." There were only two decisions in this country adverse to these views, and they were both overruled by the courts that made them. Miller *v.* Railroad (C. C.) 65 Fed. 305, overruled 76 Fed. 439, 22 C. C. A. 264; R. R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301, overruled in R. R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638.

In view of the great array of cases from nearly all the courts of this country, constituting a solid phalanx of judicial precedents, as well as text-writers, against them, I can but admire the courage with which my Brethren stand by their own unsupported views. For myself I believe with my Lord Coke that: "It is the function of a judge not to make, but declare, the law according to the golden mete wand of the law, and not by the crooked cord of discretion." "Omnis innovatio plus novitate perturbat quam utilitate prodest." To indicate how absolutely overwhelming the judicial precedents are against the views of the majority of this court I append a list of 41 cases in the United States and Canada, wherein the validity of this contract has been sustained. There are none against it. Graft *v.* Baltimore & O. R. Co. (Pa.) 8 Atl. 206; Fuller *v.* B. & O. Emp. Rel. Assoc., 67 Md. 433, 10 Atl. 237; Owens *v.* B. & O. (C. C.) 35 Fed. 715, 1 L. R. A. 75; B. & O. Emp. Rel. A. *v.* Post, 122 Pa. 579, 15 Atl. 885, 2 L. R. A. 44, 9 Am. St. Rep. 147; Black *v.* B. & O. (C. C.) 36 Fed. 655; Martin *v.* B. & O. (C. C.) 41 Fed. 125; Kinney *v.* B. & O. Emp. A., 35 W. Va. 385; 14 S. E. 8, 15 L. R. A. 142; Spitze *v.* B. & O., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; Lease *v.* Penn. Co., 10 Ind. App. 47, 37 N. E. 423; Johnson *v.* P. & R. R. Co., 163 Pa. 127, 29 Atl. 854; Ringle *v.* Penn. R. Co., 164 Pa. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Donald *v.* C., B. & Q., 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; Chicago, B.

& Q. R. Co. *v.* Wymore, 40 Neb. 658, 58 N. W. 1120; C., B. & Q. R. Co. *v.* Bell, 44 Neb. 44, 62 N. W. 314; B. & O. R. Co. *v.* Bryant, 9 Ohio Cir. Ct. R. 333; Brown *v.* B. & O. R. Co., 6 App. D. C. 246; Smith *v.* B. & O. Emp. Assoc., 81 Md. 412, 32 Atl. 181; Vickers *v.* C., B. & O. (C. C.) 71 Fed. 139; Otis *v.* Penn. Co. (C. C.) 71 Fed. 136; Shaver *v.* Penn. Co. (C. C.) 71 Fed. 931; Eckman *v.* C., B. & Q., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; P., C., C. & St. L. *v.* Cox, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; B. & O. R. Co. *v.* Stankard, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745; Maine *v.* C., B. & Q. R. Co., 109 Iowa, 269, 70 N. W. 630, 80 N. W. 315; C., B. & Q. R. Co. *v.* Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; Johnson *v.* Char. & S. R. Co., 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; P., C., C. & St. L. R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; P., C., C. & St. L. R. Co. *v.* Hosea, 152 Ind. 416, 53 N. E. 419; Beck *v.* Penn. R. Co., 63 N. J. Law, 233, 43 Atl. 908, 76 Am. St. Rep. 211; Petty *v.* Brun. & W. R. Co., 109 Ga. 666, 35 S. E. 82; Clinton *v.* C., B. & Q. R. Co., 60 Neb. 692, 84 N. W. 90; P., C., C. & St. L. R. Co. *v.* Elwood, 25 Ind. App. 674, 58 N. E. 866; Cowen et al. *v.* Ray, 108 Fed. 320, 47 C. C. A. 352; Fivey *v.* Penn. R. Co., 67 N. J. Law, 627, 52 Atl. 472, 91 Am. St. Rep. 445; Ferguson *v.* Grand Trunk, Rap. Jud. Que., 2 C. S. 54 (following Queen *v.* Grenier, 30 Can. Sup. St. 42); Hamilton *v.* St. L., K. & N. W. R. Co. (C. C.) 118 Fed. 95; Carter *v.* Brun. & W. Ry. Co., 115 Ga. 853, 42 S. E. 239; Oyster *v.* Bur. Relief Dep., 65 Neb. 789, 91 N. W. 699, 59 L. R. A. 291; State ex rel. Sheets *v.* P., C., C. & St. L. R. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635; Walters *v.* C., B. & Q., 74 Neb. 551, 104 N. W. 1066; Harrison *v.* Ala. M. Ry. Co., 144 Ala. 246, 40 South. 394.

WALKER, J., concurs.

TINDALL *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Washington, March 31, 1910.)

[107 Pac. Rep. 1045.]

Appeal and Error—Review—Harmless Error—Admission of Evidence.—In a servant's action for injuries, error in admitting in evidence a release not pleaded was harmless where the release was first properly admitted in evidence in cross-examination of plaintiff as affecting his credibility, and on redirect examination plaintiff explained the circumstances attending its execution, making no claim of fraud or duress, but assigning as a sole reason for its execution the fact that he desired re-employment, and could not get it without executing the release.

Contracts—Consideration—Sufficiency.—That which is of value to one of the parties, or a detriment to the other, is a sufficient consideration to support a contract, in the absence of fraud.

Release—Consideration.*—A release of damages executed by an injured servant, on condition that he be re-employed by the master, was binding on the servant.

Release—Mutuality.*—A contract whereby an injured servant who had been employed by the master for about five years was reinstated and allowed to work under the same circumstances as before the action, on condition that he execute a release of damages, did not lack mutuality, though the re-employment was not for any definite time.

Release—Validity—Execution.—Where an injured servant executed a release of damages, and was reinstated in his employment, and continued therein, the contract was an executed one, and the servant could not thereafter complain that the release was not signed by the master.

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by George R. Tindall against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Heber McHugh, John T. Casey, and *Milo A. Root,* for appellant.

Carroll B. Graves and *Charles H. Winders,* for respondent.

GOSE, J. This is a suit to recover damages for personal injuries sustained by the plaintiff on the 28th day of July, 1907, while in the employ of defendant as foreman of a switching crew. The case went to trial to a jury on the 5th day of November, 1909. At the close of the plaintiff's testimony, the de-

*See last foot-note of Illinois Cent. R. Co. *v.* Keebler (Ky.), 18 R. R. R. 32, 41 Am. & Eng. R. Cas., N. S., 32.

fendant challenged the sufficiency of the evidence, and moved for judgment on three grounds: (1) That there was no evidence of defendant's negligence; (2) that the plaintiff assumed the risk; and (3) that it affirmatively appeared that the plaintiff had settled the claim upon which the action was based before the commencement of the suit. The motion was sustained upon the last ground, and a judgment for costs was entered in favor of the defendant. The plaintiff has appealed.

The record discloses that the appellant has had about 22 years' experience in railroad work, 5 years of which he was in the employ of the respondent; that at the time of the accident he was foreman of a switching crew consisting of five men; that in the discharge of his duties he took three cars from a side track, placed one of them on the main track, and caused the other two to be switched back onto the side track against other cars; that, owing to a defective lug in the stationary car, the automatic coupler failed to connect, and the two cars started toward the main track, when appellant took a scantling, two by four in dimensions, and placed it at first under the front wheel of the car, and, after that wheel had passed over it, threw it under the rear wheel; that the plank split, and a sliver penetrated his hand, causing the injury complained of. About two weeks after the accident, the appellant made a report to the respondent on one of its printed forms, stating that the injury was not caused by any defect in the machinery or appliances, or through the negligence of any of the respondent's employees. No officer or agent of the respondent was present when the appellant made the report. It was his own free and voluntary act and statement. On September 24, 1907, the appellant, desiring re-employment, as a condition precedent thereto executed a release, in which he reiterated the statements made in his first report, and released and discharged the respondent from all claim for damages for the injuries he had sustained. The release recited that there was no agreement upon the part of the respondent to continue his employment for any length of time, but that he was "to be simply reinstated and allowed to work under the same circumstances as before the accident." The appellant testified that, before signing the release, he had a conversation with the claim agent of the respondent, who informed him that he could not go to work until he executed the release; that he signed it in order to get work and get money to pay his bills. The appellant was thereupon reinstated, and continued in the employ of the company until April, 1908, a period of more than six months. This action was commenced in January, 1909.

The appellant first contends that the release was not pleaded, and was improperly admitted in evidence. The error, however, was without prejudice. The release was first properly admitted in evidence in cross-examination of the appellant as affecting his

credibility. On redirect examination the appellant explained the circumstances attending its execution, making no claim of fraud or duress, but assigned as the sole reason for its execution the fact that he desired re-employment, and could not get it without executing the release. The facts were then before the court, and it was for it to determine its legal effect.

It is next urged that there was no consideration for the release. We cannot agree with this contention. The recoverable damage, if any, was unliquidated and uncertain. That which is of value to one of the parties or a detriment to the other is a sufficient consideration to support a contract in the absence of fraud. To hold that the release is not binding upon the appellant would, in effect, destroy his power to contract. He desired re-employment by the respondent, and could not obtain it without releasing it from liability for any claim for damages resulting from his injury. He acted advisedly. He understood that it rested with him to determine whether he would stand upon his claim for damages and seek employment elsewhere, or acquit the respondent of liability and secure reinstatement. He chose the latter course, as he frankly stated, because he wanted to secure employment so that he could pay his bills. This view is supported by the following cases: Forbs *v.* St. Louis, I. M. & S. Ry. Co., 107 Mo. App. 661, 82 S. W. 562; Cleveland, etc., Ry. Co. *v.* Hilligoss, 171 Ind. 417, 86 N. E. 485; Hobbs *v.* Brush Electric Light Co., 75 Mich. 550, 42 N. W. 965; Smith *v.* St. Paul & D. R. Co., 60 Minn. 330, 62 N. W. 392; Carter White Lead Co. *v.* Kinlin, 47 Neb. 409, 66 N. W. 536. In the Forbs Case the plaintiff, a railroad employee, received an injury, and, in consideration of being re-employed by the railway company "for such time only as may be satisfactory to said company," released it from all claim for any damages he had sustained. It was held that, notwithstanding the re-employment was indefinite in duration, it constituted a sufficient consideration for the discharge of the company from liability. In the Cleveland Case the plaintiff, a street car conductor, was injured in a collision while in the discharge of his duties. He executed a release to the company upon its agreement to employ him "so long as satisfactory to it, and not otherwise." The court said the consideration was sufficient to give validity to the release. In Missouri, K. & T. Ry. Co. *v.* Smith, 98 Tex. 47, 81 S. W. 22, 66 L. R. A. 741, 107 Am. St. Rep. 607, cited by the appellant, a release, executed in consideration of re-employment "for such time only as may be satisfactory to said company," was held to have been executed without consideration. We think the rule announced by the Missouri and Indiana courts is more in consonance with the fundamental law of contracts. It is of the highest importance to the individual that the freedom of contract be not impaired, and that he be given the fullest liberty to determine for himself the question

of the sufficiency of the consideration where no fraud is present, and where the consideration does not touch the question of public policy.

The point is made that the contract is wanting in mutuality. This contention is also without merit. Carter White Lead Company *v.* Kinlin, *supra;* Smith *v.* St. Paul, etc., Co., *supra.* The precise point urged is that there was no obligation on the part of the respondent to continue the employment for any definite time. The appellant had been employed by the respondent for about five years, and was reinstated and "allowed to work under the same circumstances as before the accident."

The questions of duress and public policy are suggested. The appellant's testimony shows affirmatively, as we have seen, that he voluntarily executed the release. Public policy, we apprehend, is not violated by permitting a person to enter into a contract to perform legitimate labor.

Finally, it is said the respondent did not sign the release, and that it is therefore of no binding force. The release shows on its face that it was not intended that the respondent should sign it. It did, however, reinstate the appellant, and continued his employment for a period of more than six months in consideration of the release. When the appellant resumed work, the contract was an executed one, and he cannot now complain that the release was not signed by the respondent.

The view we have taken of the case makes it unnecessary to consider the questions of the negligence of the appellant and assumption of risk.

The judgment is affirmed.

RUDKIN, C. J., and CHADWICK and FULLERTON, J. J., concur.

FLORIDA EAST COAST RY. CO. *v.* LASSITER.

(Supreme Court of Florida, June 25, 1909, Headnotes Filed Oct. 11, 1909.)

[50 So. Rep. 428.]

Constitutional Law—Due Process of Law—Equal Protection of Laws—Injury to Railroad Employees—Liability of Master.*—Section 3150, Gen. St. 1906, that imposes liability upon railroad companies for injury to their employees, who are free from fault, through the negligence of coemployees, does not deny to such companies due process of law, or the equal protection of the law, and is not violative of the fourteenth amendment to the federal Constitution.

Principal and Agent—Evidence of Agency—Declarations of Agent.—Agency cannot be established by the declaration of the supposed agent.

Trial—Appeal and Error—Special Verdict—Right to Require—Review—Discretion of Lower Court—Recommendation of Special Verdict.—In the absence in Florida of a statute on the subject of special verdicts, our trial courts are not justified in directing the jury to find a special verdict, though they may, in their discretion, in a proper case recommend one; but the jury has the right to decline finding any other than a general verdict. The appellate court will not review or reverse such trial courts for their refusal to exercise their discretion in such cases.

Damages—Instructions.—In cases where a plaintiff's prospective losses in the future during his life expectancy from the diminished earning capacity consequent upon his injuries is made a ground of recovery, the jury should be instructed that, in estimating such prospective future damages resulting from the diminished earning capacity, they should reduce such damages to their present value, and that such present value thereof only should be included in their verdict.

Cockrell and Hocker, JJ., dissenting.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, St. Lucie County; Minor S. Jones, Judge.

Action by Charles O. Lassiter against the Florida East Coast Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. M. Robbins, for plaintiff in error.
Beggs & Palmer, for defendant in error.

*See last foot-note of St. Louis, etc., R. Co. *v.* McNamare (Ark.), 33 R. R. R. 713, 56 Am. & Eng. R. Cas., N. S., 713; last foot-note of Hoxie *v.* New York, etc., R. Co. (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537.

TAYLOR, J. The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of St. Lucie county in an action for damages for personal injuries; the trial resulting in a verdict and judgment for the plaintiff below, for review of which the defendant below brings the case here by writ of error.

The plaintiff, at the time of the injury sued upon, was an employee of the defendant railway company, and brought his suit under the provisions of section 3150 of the General Statutes of 1906, which reads as follows:

"If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery of such company, he being at the time of such injury an employee of the company, and the damage was caused by negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding."

The defendant demurred to the plaintiff's declaration on the ground that this statute denies the defendant equal protection of the law, in that it attempts to create a new tort as to only one class of carriers, and is obnoxious to the fourteenth amendment of the Constitution of the United States. This demurrer was overruled, and such ruling is assigned as error.

The contention in support of this assignment is that the new rule of liability of the master to his servant, who is without fault, for the negligence of a fellow servant, imposed by this statute, is an unjust discrimination against railroad carriers, in confining such rule to them, and in not extending it to all classes of carriers alike; that there is no just basis for such a classification of carriers. These contentions are untenable.

In the ably considered case of Kiley *v.* Chicago, M. & St. P. Ry. Co. (decided by the Supreme Court of Wisconsin in January, 1909) 119 N. W. 309, in which the same contentions were made that are here urged, it was tersely and properly held that: "The necessity and propriety of classification for legislative purposes are to be determined by the Legislature, and cannot be disturbed when exercised within the rule declaring that classification must be based on substantial distinctions and germane to the purpose. The business of operating railroads differs from other business in its nature, in its relation to the public, and in the particular dangers incurred by its employees and the public, and calls for special regulation to meet the conditions peculiar to it, and such as are wholly inapplicable to any other business, and that such a statute is not invalid as denying to railroad companies the equal protection of the law, nor does it deny to them due process of law." The court did not err in overruling this demurrer. See note to V. C. G. M. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313.

The third assignment of error complains of the court's sustaining a challenge for cause made by the plaintiff to a talesman tendered as a juror. Inasmuch as there will have to be another trial of the cause, and as it is unlikely that the same occurrence will again transpire at another trial, it becomes unnecessary to pass upon this assignment.

At the trial it was shown that after the injury to the plaintiff he was attended by a physician, one Dr. Lloyd, and that owing to the unskillfulness of this physician the plaintiff's injury was very much aggravated, and in an attempt by the plaintiff to prove that he was the railroad's physician, and that the railroad was responsible for his unskilled treatment, the plaintiff testified that Dr. Lloyd told him he was the company's physician. The defendant moved the court to strike this testimony; but such motion was denied, and this ruling is assigned as error. This was error. Agency cannot be established by the declarations of the supposed agent himself. Lakeside Press & Photo Engraving Co. *v.* Campbell, 39 Fla. 523, 22 South. 878; Elliott on Evidence, § 252, and citations. As the same facts were subsequently shown by competent evidence without objection, this error may be regarded as harmless.

The second count in the plaintiff's declaration sought recovery of damages from the defendant railway company because of the maltreatment by the physician whom it was alleged was put in charge of the plaintiff's case by the defendant; the defendant knowing at the time of said physician's want of skill in his profession. At the close of the plaintiff's testimony the defendant moved the court to instruct the jury not to consider any evidence put in by the plaintiff to support said second count of his declaration, because the plaintiff had wholly failed to prove that the defendant had any knowledge of the want of skill in his profession by said physician when it employed him, and also at the same time moved the court, on the same ground, to require the plaintiff to elect upon which count of his declaration he would proceed. Both of these motions were denied by the court, and these rulings constitute the fifth and sixth assignments of error.

There was no error in either of these rulings. At the time said motions were made only the plaintiff's testimony was before the jury, and he had the right at that stage of the case to an opportunity to make good the second count of his declaration, if he could, from the defendant's witnesses. Not having done so, however, at the close of all the evidence, the court properly instructed the jury that the plaintiff had failed to make out his case under the second count of his declaration, and that he could not recover anything under said second count.

The seventh assignment of error is predicated upon an argument of plaintiff's counsel to the jury that was objected to by

the defendant, and the court moved to instruct the jury not to consider such argument, but which motion was denied by the court. The argument in question tended to make capital for the plaintiff out of the matter of the second count in the declaration, which, as before seen, was out of the case for lack of proof to sustain it. Such argument was, therefore, improper, and the jury should have been instructed, as requested, to disregard it.

At the close of the evidence the defendant's counsel requested the court to instruct the jury that it was within their discretion to return either a general or special verdict, which request was refused by the judge. The judge also remarked in the hearing of the jury that he did not consider the case one in which a special verdict would be proper. This refusal to instruct as requested and the accompanying remark of the judge constitute the eighth and ninth assignments of error.

We have no statute in Florida on the subject of special verdicts, but at the common law it seemed to be a matter wholly within the discretion of the jury as to whether they would return a general or special verdict. See 2 Andrews, American Law, 1491; Clementson on Special Verdicts pp. 5, 6. In the same work, at page 179, it is said that, in states where no specific statutory provision on the subject exists, special verdicts may be found as at common law. The court is not justified in directing the jury to find a special verdict, though it may, in its discretion, in a proper case recommend one. A jury has the right to decline finding any other than a general verdict. In the case of Baltimore & Ohio R. R. Co. *v.* School District, 3 Penny. (Pa.) 518, it is held that "a court may, in its discretion, recommend a special verdict, but it is a discretion the appellate court will review and reverse for their refusal to exercise it." Following this authority, we will not undertake to review or reverse the action of the circuit judge in refusing to exercise his discretion in suggesting to the jury their right to return a special verdict. Nor can we discover how the defendant could have been injured by the remark of the judge in the hearing of the jury to the effect that he did not think the case was one where a special verdict was proper.

The tenth assignment of error is based upon the insufficiency of the evidence to support the verdict, and will be considered hereafter in dealing with the motion for new trial.

The eleventh assignment of error is based upon the refusal of the court to instruct the jury to return a verdict for the defendant, on the ground that the facts not controverted showed contributory negligence on the part of the plaintiff, which in an appreciable degree contributed to his injury. The writer of this opinion thinks that under the facts in proof this charge should have been given, for the following reasons and on the following authorities: The undisputed facts in proof make out

the following case: The plaintiff was an employee of the defendant company in the capacity of switchman in the railway yards of the defendant at Ft. Pierce, which was a division point for freight trains, and where there is a coal chute for supplying the engines with coal, which coal chute is loaded from cars placed on a track that runs between the chute and the pit; the coal being first dumped from the cars into the pit, and from there hoisted up into the chute. On the 16th day of February, 1906, an engineer in charge of an engine and the plaintiff, on being instructed to place a car of coal at the pit to be unloaded, backed into what they called the "cripple track" and picked up a car of coal. The plaintiff rode out of the cripple track on the north end of the car, and got off at a switch and threw it, and then stepped back some few feet towards a crossing to see that it was clear, and, seeing that it was clear, signaled to the engineer in charge of the engine to back, which he did slowly. Then the plaintiff stepped towards the car as it came slowly back, and mounted it by putting his foot in the stirrup and catching hold of the lower end of the grab iron, and after he had hung there for a distance of 25 or 30 feet, on straightening himself up to a more comfortable position, the grab iron gave way, letting him fall to the ground, when one of the car wheels passed over his foot, crushing it to an extent that necessitated amputation of the foot.

While the plaintiff testified that it was necessary for him to mount this car and ride on it back to the coal pit to see where to place it, yet his own evidence shows that from the point where he mounted the car back to the coal pit where it was to be placed in position for unloading was only 151 feet, and that the cars were being moved no faster than he could walk, and that he would have had to dismount just before reaching the coal pit in order to more effectually signal to the engineer in placing the car at the pit, and that between the point where he mounted the car and the coal pit the track curved, so that if he had undertaken to signal the engineer from his position on the car he would have been compelled to lean out from the car as far as he could in order for the engineer to see him or his signals. On the other hand, the uncontradicted evidence of the defense is that there was no necessity for his mounting this car, but that, on the contrary, his proper place was on the ground for the more efficient signaling to the engineer, and the plaintiff's own evidence shows that he could have walked back from the point where he mounted the car to the coal pit, where he would have had to dismount again, a distance of only 151 feet, as quickly, at the rate the cars were being propelled, as the cars would have arrived there. So that his mounting this car at the time and place that he did was wholly uncalled for by the demands of duty or necessity, was contrary to the efficient per-

formance of his duty on that occasion, and undertaken by him solely for his own pleasure or convenience, and at his own risk. The boarding of a train in motion is necessarily attended with more or less danger under any circumstances, and employees of railroads, as well as the public generally, owe it to their own safety to abstain from attempting it, unless the demands of duty make it necessary. This court, following the construction put by the Georgia court upon their statute, from which ours in such cases has been adopted, has repeatedly held that an employee of a railroad company cannot recover damages from such company for injuries sustained by him on account of the negligence or carelessness of another employee, unless wholly without fault himself. Duval, Receiver *v.* Hunt, 34 Fla. 85, 15 South. 876. In Atlantic Coast Line R. Co. *v.* Ryland, 50 Fla. 190, 40 South. 24, it is held that under our statute, authorizing recovery by an employee of a railroad company of damages for injury received by the running of its locomotives, cars, or other machinery through the negligence of a coemployee or fellow servant, the injured employee, in order to recover, must himself be entirely free from fault or negligence. He must do nothing to contribute to his injury, and must neglect to do nothing to prevent the consequence of the negligence of the other servants. Any negligence of the plaintiff in such a case, however slight, that contributes in an appreciable degree to the cause of the injury, defeats a recovery.

In the case of Cunningham *v.* Chicago, M. & St. P. R. Co. (C. C.) 17 Fed. 882, it is said that: "If a man voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions that he may take, in connection with the discharge of his duty, that are safe, he cannot recover damages for that injury to which he has contributed by his own negligence." To the same effect is the ruling in Day *v.* Louisiana West. Ry. Co., 121 La. 180, 46 South. 203. In Dowell *v.* Vicksburg & Meridian R. R. Co., 61 Miss. 519, it was held that a servant of a railroad company cannot recover in a suit against the company for injuries received while recklessly attempting to board a moving train, although it is shown that the train was improperly equipped and that some of its appliances were defective. That under these circumstances the fact that the plaintiff was in the habit of boarding moving trains, or that he had been seen to do so on previous occasions with impunity, will not avail him.

In the case of Southern Ry. Co. *v.* Harbin, 110 Ga. 808, 36 S. E. 218, the Supreme Court of Georgia approvingly quotes the following ruling from the case of M. & O. R. R. *v.* George, 94 Ala. 200, 10 South. 145: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is thereby injured."

In the case of Southern Kansas R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113, it is held that evidence of the practice and usage of others in climbing the ladder of a box car when a train is in motion is not admissible to prove due care on the part of a party injured at the time of the accident.

In the case of Quirouet *v.* Alabama G. S. R. Co., 111 Ga. 315, 36 S. E. 599, it was held that where an employee has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the safe method; and if, instead of so doing, he elects to pursue the dangerous way, and is, in consequence, injured, he is guilty of such negligence as will bar an action for damages against the master.

In the instant case the undisputed facts in proof show that the plaintiff here was in safety on the ground; that his duties required him to proceed a distance of only 151 feet to a point at the coal pit to signal the engineer as to the placing there of a car load of coal; that he could have walked this short distance with perfect safety to himself, and arrived there in ample time to give his signals, but that, instead of choosing the safe walk, he, wholly without necessity, selected the dangerous feat of boarding a moving coal car in order to ride thereon the short distance that he had to go. Under these circumstances the writer thinks he was guilty of such contributory negligence as will bar any recovery of damages against his employer. The majority of the court, however, are of a different opinion, and think that the boarding of the train by the plaintiff under the circumstances was not negligence in law per se, but that it was a question of fact for the jury to decide as to the necessity for him to so board it, and as to whether his mounting it under the circumstances stated was negligence on his part that contributed to his injury; and, so thinking, the majority of the court are of the opinion that the requested peremptory charge was properly refused. See Florida Cent. & P. R. Co. *v.* Mooney, 40 Fla. 17, 24 South. 148; Florida Cent. & P. R. Co. *v.* Mooney, 45 Fla. 286, 33 South. 1010, 110 Am. St. Rep. 73; Kilpatrick *v.* Grand Trunk Ry. Co., 74 Vt. 288, 52 Atl. 531, 93 Am. St. Rep. 887. See, also, note in 97 Am. St. Rep. 985.

The twelfth assignment of error is expressly abandoned here.

The thirteenth assignment of error is based upon the court's refusal to give the following instruction requested by the defendant: "If you believe from the evidence that one or more of the defendant's car inspectors inspected the car in question shortly before the accident, and found the safety appliances, including the hand hold in good order, and that if there was any defect in the hand hold at the time of the inspection it was such as to deceive human judgment, your verdict must be for the defendant, because the defendant cannot be held liable if it appears

that it had the car inspected shortly before plaintiff used it, and that the inspector or inspectors used ordinary and reasonable care and diligence in making the examination and failed to discover the defect, if it then existed, which caused the injury to the plaintiff."

The writer hereof is of opinion that there was evidence in the case which justified the giving of this charge, and we think it states the law correctly, and the subject-matter thereof was not covered by any instruction given to the jury. The majority of the court concludes that the refusal to give this charge was not error.

The fourteenth and fifteenth assignments of error are predicated upon the giving of the first and second charges requested by the plaintiff. No useful purpose will be subserved by a reproduction of these questioned charges here. It is sufficient to say that they state the law correctly and there was no error in giving them to the jury.

The sixteenth assignment of error is predicated upon the giving of the following charge at the request of the plaintiff: "A servant in the performance of his duties, is bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circumstances, and if he is injured by failure to exercise such care his master is not liable. He must take ordinary care to learn the dangers, which are likely to beset him in the service. He must not go blindly to his work where there is danger. But this doctrine must be taken in connection with the qualification that mere knowledge of a defect or method will not always be sufficient to charge the servant with an assumption of the risk. Such knowledge must convey to a mind like his the danger that may or is likely to result to him in his employment from the defect or negligent act; for it is one thing to be aware of defects in the instrumentality or plans furnished by the master for the performance of his service, and another thing to know or appreciate the risks resulting or which may follow from such defects. The question is, taking his experience or inexperience into consideration, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risk and not merely the defects existed."

This charge seems to have been taken from the second headnote in the case of Flowers *v.* Louisville & N. R. Co., 55 Fla. 603, 46 South. 718. It states the law correctly when applied to a case like the one in which the utterance was made. In that case the court was dealing with a case of inexperience in the use of a certain machine, where, although the inexperienced servant may have known of defects in the machine, he might at the same time not have known of or appreciated the danger likely to result from the existence of such defects. But in the

instant case there is no such question. We apprehend that, had it been shown in the present case that the plaintiff knew, at the time he mounted the car in question by seizing hold of the grab iron, that such grab iron was not properly fastened to the car, he would clearly have been chargeable with such contributory negligence as would defeat his recovery; and in such case he would not have been heard to say, "Yes; I knew it was loose, and not fastened to the car; but I did not appreciate the fact that an unfastened grab iron would not hold me up." The charge as applied to the facts of this case is a misfit, is calculated to have misled the jury, and it was error to give it.

The seventeenth assignment of error is not argued here, and is therefore abandoned.

The following charge was given to the jury and was duly excepted to: "If you find from the evidence that the plaintiff is entitled to recover, then you will be required to determine the amount of the damages he has sustained, if any; and in estimating the damages you will take into consideration the plaintiff's bodily pain and suffering, if any, occasioned by the injury complained of, sickness resulting from the injury, if any, his age, his health and condition before the injury complained of, and the effect on his health, and in case you find that the plaintiff has been to any extent permanently injured or disabled, his loss of time, if any, the money he was making in his business or by his labor, and the effect, if any, of the injury in the future upon the plaintiff in attending to his affairs generally in pursuing his business or calling, and allow him such damages as in your opinion, from all the facts and circumstances in evidence, will be a fair and just compensation for the injury he has sustained."

In view of the feature in this charge to the effect that the jury could, in estimating the plaintiff's damages, base such damages upon the diminution of his earning capacity during his entire expectancy of life, and inasmuch as this feature of the plaintiff's injury was the chief basis for the assessment of damages in the case, this charge was faulty in not instructing the jury that, in estimating his prospective losses in the future during his life expectancy from his diminished earning capacity, such future damages should be reduced to their present value, and the present value thereof only should be included in their verdict. See Jacksonville Elec. Co. *v.* Bowden, 54 Fla. 461, 45 South. 755, 15 L. R. A. (N. S.) 451; Atlantic & W. P. R. Co. *v.* Newton, 85 Ga. 517, 11 S. E. 776; Richmond & D. R. Co. *v.* Allison, 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43; Fulsome *v.* Town of Concord, 46 Vt. 135; 2 Sedgwick on Damages, § 485; Duval, Receiver, *v.* Hunt, 34 Fla. 85, 15 South. 876.

For the errors found, the judgment of the circuit court in said

cause is hereby reversed, at the cost of the defendant in error, and a new trial awarded.

WHITFIELD, C. J., and SHACKLEFORD and PARKHILL, JJ., concur.

COCKRELL and HOCKER, JJ., are of the opinion that upon the whole record no substantial error appears.

O'NEAL *v.* SOUTH & W. R. CO.

(Supreme Court of North Carolina, April 27, 1910.)

[67 S. E. Rep. 1022.]

Master and Servant—Fellow-Servant Act—Operation of Railway.—To bring a case within the railway fellow-servant act (Revisal 1905, § 2646), it must appear that the servant was injured while performing a service necessary to or connected with the operation of the railway as a common carrier.

Master and Servant—Construction of Railroad—Fellow-Servant Act—"Operation of a Railroad."*—A blacksmith engaged in construction of a railroad bridge, and injured by the act of a fellow servant in letting a coil of rope fall while they were both at camp, is not injured in the "operation of a railroad," within the meaning of the railway fellow-servant act (Revisal 1905, § 2646).

Appeal from Superior Court, Surry County; E. B. Jones, Judge.

Action by J. H. O'Neal against the South & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

R. C. Freeman, Folger & Folger, and *W. F. Carter,* for appellant.

J. Norment Powell and *J. J. McLaughlin,* for appellee.

BROWN, J. Taking all the evidence in its most favorable light for the plaintiff, it tends to prove that he was employed by one Ellis, foreman of the masonry force of defendant, as a blacksmith for the construction forces of defendant at camp 10 near Marion, N. C. Plaintiff and two fellow servants were endeavoring to hang up a coil of rope weighing from 200 to 300 pounds upon a peg in the toolhouse. For some reason unexplained the

*See generally foot-note of Texarkana, etc., Ry. Co. *v.* Anderson (Tex.), 33 R. R. R. 351, 56 Am. & Eng. R. Cas., N. S., 351; Hubbard *v.* Central of Georgia Ry. Co. (Ga.), 31 R. R. R. 769, 54 Am. & Eng. R. Cas., N. S., 769.

fellow servants let fall the coil on plaintiff's shoulders and injured him.

Omitting any discussion of the question of negligence, it is plain that, if any negligent act caused the injury, it was the act of a fellow servant for which the defendant is not liable.

According to all the evidence, the road was being constructed, not operated. To use a nautical term, the "ship was not in commission." The plaintiff was employed as a blacksmith on the construction force. While it is not necessary to prove that the plaintiff was injured by a fellow servant while actually on a train or operating it, it must appear, to bring the case within the railway fellow-servant act (Revisal 1905, § 2646), that he was injured while performing a service necessary to or connected with the operation of the railway as a common carrier. This plaintiff was not performing a service necessary to or connected with the use and operation of a railroad. He was the blacksmith for a force engaged in constructing bridges, and was hurt while attempting to hang up a coil of rope, 20 miles from the then terminus of the railroad.

The law governing the case is so fully stated in the opinion of this court by the Chief Justice in Nicholson *v.* Railroad, 138 N. C. 516, 51 S. E. 40, that it is unnecessary to further discuss the subject.

Affirmed.

PEOPLE *v.* ERIE R. CO.

(Court of Appeals of New York, April 26, 1910.)

[91 N. E. Rep. 849.]

Master and Servant—Hours of Labor—Regulation—Police Power.* —Labor Law (Consol. Laws, c. 31, § 8) § 7a, making it unlawful for any corporation or receiver operating a railroad in New York to require or permit any telegraph or telephone operator who spaces trains by the use of telegraph or telephone under the block system to remain on duty for more than eight hours in a day of twenty-four except in case of extraordinary emergency, and imposing a penalty for violation thereof, was a proper exercise of the state's police power in order to protect the public lest such employees become fatigued and cause accidents to trains.

*For the authorities in this series on the subject of the police powers of a state over railroads, see first foot-note of St. Louis, etc., R. Co. *v.* McNamare (Ark.), 33 R. R. R. 713, 56 Am. & Eng. R Cas., N. S., 713; fourth head-note of National Car Ad. Co. *v.* Louisville & N. R. Co. (Va.), 33 R. R. R. 179, 56 Am. & Eng. R. Cas., N. S., 179; Southern Ry. Co. *v.* Forrest's Adm'x (Va.), 33 R. R. R. Am. & Eng. R. Cas., N. S., 52.

People v. Erie R. Co

Railroads—Eminent Domain—Operation—Individual Operation.†—An individual as well as a corporation may operate a railroad, though he can have no power to acquire land by eminent domain for railroad purposes.

Evidence—Judicial Notice—Operation of Railroads.‡—Judicial notice may be taken of the fact that all the railroads of a state to which Labor Law (Consol. Laws, c. 31, § 8) § 7a, regulating the hours of labor for telegraph and telephone operators, applies, are, and necessarily must be, operated by corporations, and not by individuals.

Commerce—Federal and State Jurisdiction—Division.—Commerce for the purpose of defining federal and state jurisdiction in legislation is divided into three fields: That in which the power of the state is exclusive, that in which the state may act in the absence of legislation by Congress which is controlling and exclusive, and that in which the authority of Congress is exclusive, and the states cannot interfere at all.

Commerce—Federal Regulation—State Loss—Hours of Labor.—Act Cong. March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), provides that no railroad telegraph or telephone operator receiving or transmitting orders affecting train operations shall be required or permitted to remain on duty for a "longer" period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated day and night. Held, that such act was only intended to prescribe a general rule available to conditions throughout the country in the movement of interstate commerce, and hence did not so cover the subject as to preclude the state from passing Labor Law (Consol. Laws, c. 31, § 8) §7a, making it unlawful for any corporation or receiver operating a railroad in New York to permit any telegraph or telephone operator spacing trains by telegraph or telephone under the block system to remain on duty for more than eight hours in a twenty-four hour period.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the People against the Erie Railroad Company. From an order of the Appellate Division, reversing a judgment for the People (135 App. Div. 767, 119 N. Y. Supp. 873), the People appeal. Reversed and judgment of trial court affirmed.

†For the authorities in this series on the question as to who may, and may not, exercise the power of eminent domain, see first foot-note of State ex rel. Milwaukee Term. Ry. Co. *v.* Superior Court of King County (Wash.), 33 R. R. R. 423, 56 Am. & Eng. R. Cas., N. S., 423.

‡For the authorities in this series on the subject of judicial notice of things pertaining to railroads, see first foot-note of Bergan *v.* Central Vt. Ry. Co. (Conn.), 34 R. R. R. 426, 57 Am. & Eng. R. Cas., N. S., 426; second foot-note of Brian *v.* Oregon S. L. R. Co. (Mont.), 34 R. R. R. 18, 57 Am. & Eng. R. Cas., N. S., 18; first foot-note of Norfolk & P. T. Co. *v.* Forrest's Adm'x (Va), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

People *v.* Erie R. Co

This is an appeal from an order of the Appellate Division, Second Department, reversing a judgment against the defendant for a fine because it permitted or required an employee in charge of one of its block signal towers to be on duty more than eight hours in twenty-four, in violation of the provisions of section 7a of the labor law (now section 8, c. 31, in the Consolidated Laws), which reads as follows: "It shall be unlawful for any corporation or receiver, operating a line of railroad, either surface, subway or elevated, in whole or in part in the state of New York, or any officer, agent or representative of such corporation or receiver to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed the 'block system' (defined as follows): Reporting trains to another office or offices or to a train dispatcher operating one or more trains under signals, and telegraph or telephone lever men who manipulate interlocking machines in railroad yards or on main tracks out on the lines or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, food, or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employee, he shall be paid in addition at least one-eighth of his daily compensation. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum of not less than one hundred dollars, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation or association violating this section, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever, one-half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this section shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four hours then the provisions of this section shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely eight."

The defendant was engaged in both interstate and intrastate commerce, and the majority of the trains which the employee in question spaced were moving the former.

Edward R. O'Malley, Atty. Gen., for the People.
George N. Orcutt, for respondent.

HISCOCK, J. (after stating the facts as above). If section 7a of the labor law, above quoted, was a valid enactment in August, 1907, applicable to a block signal tower operator, engaged in spacing interstate and local trains, the order appealed from was erroneous and the judgment of the trial court correct, because there is no question that during that month the respondent required one of its employees thus engaged to be on duty more than eight hours out of twenty-four in violation of the provisions of that act. Two reasons are alleged why said statute was not valid and applicable. The first of these is that the Legislature had no power to place such a limitation on the right of the respondent to keep such an employee on duty, and the second one is that, such employee, being in part engaged in forwarding interstate commerce, Congress had the superior power to regulate his hours of labor, and that it had done this by legislation which barred or superseded the state legislation referred to.

It is clear that the first defense cannot be maintained. The doctrine that the Legislature under proper circumstances and within reasonable limits may exercise its police power in the regulation of hours and conditions of labor is now thoroughly and broadly established. One familiar form of this class of legislation is that which has for its object the promotion of the health and welfare of the employee as especially in the case of women and children. Another class seeks to protect the safety of the public by limiting the hours of labor of those who are in control of dangerous agencies lest by excessive periods of duty they become fatigued and indifferent and cause accidents leading to injuries and destruction of life. This statute comes within the latter class, and this court in the case of Pelin *v.* N. Y. C. & H. R. R. R. Co., 102 App. Div. 71, 92 N. Y. Supp. 468; Id., 115 App. Div. 883, 104 N. Y. Supp. 1136; Id., 188 N. Y. 565, 81 N. E. 1171, affirmed a judgment where the basis of the recovery was as here, that the defendant had permitted or required an employee to be on duty for a length of time in excess of that prescribed by another section of the act which we are now considering.

The counsel for the respondent has reviewed at length the duties discharged and the exact amount of time required in the actual performance thereof by the operator on the occasion in question, and he makes these facts the basis for an argument that no conditions existed which warranted the Legislature in fixing the limit which it did, and he insists that the period of service prescribed for this particular class of employees is entirely out of

proportion to that permitted to various other employees engaged in the operation of a railroad. His argument is not without force, and very well might be addressed to the Legislature as a reason for permitting employment for a larger number of hours. I do not think, however, that we can say that the facts so conclusively show a lack of relation between the legislation and the justifiable ends sought to be gained that we can condemn the statute as unconstitutional; for, while each of the duties performed by the operator seems simple enough, still as a whole they form quite a complicated series of acts in the transmission of signals, the giving of orders and the movement of trains, and, while the actual time occupied in performing these acts is not large, still the employee for the proper discharge of his duties is compelled to be on the alert during the entire time of his employment, and it not infrequently happens that lack of active occupation during hours of duty is more trying than work itself. Thus it is not at all inconceivable that such an employee subjected to too long hours of duty and confinement might become physically fatigued and mentally inert and make mistakes which would lead to the destruction of life. This being so, it was permissible for the Legislature to pass a statute limiting the hour of labor, and it cannot be said that there is no reason or argument to support its judgment that eight hours was a proper limit. The control of such a matter by the Legislature would naturally be exercised by virtue of the police power. If the form of the statute in question could be criticised as relating only to corporations engaged in the operation of railroads, and therefore unduly discriminatory against them, it now being settled that an individual as well as a corporation may operate a railroad (Village of Phœnix *v.* Gannon, 195 N. Y. 471, 88 N. E. 1066), I think that we might take judicial notice of the fact that all of the railroads in the state to which this act could apply are and almost necessarily must be operated by corporations and not by individuals, since the latter have no power to acquire land by eminent domain for railroad purposes. Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530.

Moreover, even if the statute failed as a valid exercise of the police power, personally I am not doubtful that under its reserved control over corporations the Legislature might pass such an act in regulation of the performance of the business for which a railroad was organized. Lord *v.* Equitable Life Assurance Society, 194 N. Y. 212, 237, 87 N. E. 443, 22 L. R. A. (N. S.) 420; People *v.* Phyfe, 136 N. Y. 554, 557, 32 N. E. 978, 19 L. R. A. 141; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. Ed. 1084; Louisville & N. R. R. Co. *v.* Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; Mayor, etc., of Worcester *v.* Railroad Co., 109 Mass. 103.

Equally important and possibly of more difficult solution are the considerations presented by the second defense, that the stat-

ute here sought to be enforced trespasses on a field of legislative action which had already been pre-empted by Congress by virtue of its power to govern interstate commerce and those engaged therein, and that, therefore, it was forbidden and nugatory. It will be noted that this defense assumed, as I think correctly, that the labor law purports and attempts indiscriminately and inseparably to regulate the hours of the classes of employees designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the Legislature over the former.

This defense is predicated on the fact that Congress passed a statute, approved March 4, 1907 (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1909, p. 1170]), and taking effect a year later, which, so far as is here material, provided: "No operator, train dispatcher or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated day and night." Concededly this statute applied to such an operator as the one whose alleged excessive confinement is complained of here when engaged in operating interstate traffic, and the reasoning is that, Congress having thus regulated his hours of labor, the state could not prescribe a different or additional regulation applicable to the same man. As is well understood, the general subject of commerce for the purpose of defining federal and state jurisdiction in legislation may readily be divided into three fields. The first is that in which the power of the state is exclusive; the second that in which the state may act in the absence of legislation by Congress which is controlling and exclusive; the third that in which the authority of Congress is exclusive and the states cannot interfere at all. Covington & C. Bridge Co. *v.* Kentucky, 144 U. S. 204, 209, 14 Sup. Ct. 1087, 38 L. Ed. 962. It is important to keep in mind for the purposes of this discussion that within the first field are included regulation by the state of local or intrastate commerce, and it is conceded, and therefore the reasons will not be discussed, that the state acting within the second field might pass the present statute in the nature of a police regulation of the hours of those engaged in interstate as well as local commerce, unless the federal statute barred such legislation. Did it do so?

Of course, it is apparent that, if the federal statute saying that a signal tower operator may not work more than nine hours prevents a state from saying under controlling conditions that he may not work in excess of a lesser number of hours, state legislation of an analogous character on other subjects which readily suggest themselves, such as the proper weight of rails, the safe

speed of trains, the necessary proportion of cars to be equipped with airbrakes, may be prevented by federal legislation simply prescribing the minimum rule of precaution, and the protection by the state of the safety of its citizens at least rendered more complicated and difficult; for, unless there shall be in the future such a separation of interstate and local traffic as has not yet occurred, and which might be made extremely burdensome to the railroads, it will seldom happen that agencies employed in moving the former will not also be moving the latter, and therefore, if the state is prevented by a federal statute like that before us from adopting additional, but not conflicting, requirements which it deems to be necessary, it will be unable to insure the safety of local passengers and traffic. And it is obvious that a factor of safety like that in the present federal statute adapted as we must assume to average conditions prevailing throughout the country often will be quite insufficient under the special conditions prevailing in a given state. In addition, it is doubtless established by the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, that a person injured in the course of local traffic as the result of negligence of an employee could not predicate a claim for relief on the federal statute limiting the latter's hours of employment.

Passing these general considerations, when we seek for authorities on the question whether the federal statute is exclusive and preventive of the state statute, no dicision by the Supreme Court of the United States is found rendered upon facts so similar to those here presented as to make it clear and manifestly controlling. We are obliged to rely on general rules which have been laid down by that learned court from time to time in the consideration of questions of the same general class and which do not seem to be always quite harmonious. In Gulf, etc., Ry. Co. *v.* Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, the court had before it the question whether a state statute making it unlawful for a railroad company to charge and collect a greater sum for freight than was specified in the bill of lading was when applied to interstate freight in conflict with a federal statute providing that it should be unlawful to charge and collect a greater or less compensation for the transportation of property than was specified in the published schedule of rates provided for by the act. It was conceded that the state act, although incidentally relating to interstate commerce, would be valid as a police regulation in the absence of congressional legislation, but it was held that it conflicted with the latter, and was therefore invalid. Mr. Justice Brewer, writing for the court, said: "Clearly the state and the national acts relate to the same subject-matter and prescribe different rules. * * * The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. * * * In case of such a conflict the state law must yield.

* * * The question is not whether in any particular case operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes, operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law." If we should apply the language quoted with any degree of literalness to the present case, it would be difficult to escape the conclusion that the eight-hour state statute was barred by the federal statute. But it is to be observed that what was there written was so written in a case where at times it would not be possible to observe the state statute without violating the federal one, and an element of possible actual conflict was present which is absent here, for, of course, a restriction of employment to eight hours does not in any ordinary sense violate the statute against employment in excess of nine hours.

Other cases seem to me to lay down the rule in more liberal terms in favor of the state legislation. In Missouri, K. & T. Ry. Co. *v.* Haber, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878, and in Reid *v.* Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, the court had before it the question of alleged conflict between a federal statute regulating the inspection, etc., of cattle for purposes of interstate shipment and state statutes relating to the same subject. Congress had adopted an act known as the "Animal Industry Act," which was designed to regulate and prevent the shipment of infected and diseased cattle, and which went into the subject with much detail and completeness. Amongst other things it provided that for the purposes of the act "splenetic or Texas fever should not be considered a contagious, infectious or communicable disease," and apparently it was broad enough to authorize a certificate by federal officials that cattle were free from any disease. Notwithstanding this, the court held in the first case that the state statute was valid which permitted one of its citizens to recover damages sustained by communication to his animals of Texas or splenetic fever by cattle being transported in accordance with the federal statute, and in the last case upheld a statute making it a criminal offense under certain conditions to bring into the state animals without a certificate by state authorities that they were free from disease. It will be observed that in the first case a recovery was had under the state statute on the theory that Texas or splenetic fever was communicable, which was expressly negatived by the federal statute. Mr. Justice Harlan wrote in each case. In the first one he expressly approved as settled law the rule enunciated in Sinnot *v.* Davenport, 22 How. 227, 243, 16 L. Ed. 243, and stated "that a statute enacted in execution of the reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the constitution, unless the repugnance or conflict is so direct and positive that the

two acts cannot be reconciled or stand together." In the latter case he wrote: "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to affect that result is clearly manifested" (page 148 of 187 U. S., page 96 of 23 Sup. Ct. [47 L. Ed. 108]), and again cited with approval Sinnot *v.* Davenport,

In Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, the court passed upon the validity of the statute of Alabama requiring engineers to undergo an examination and obtain a license from a state board of examiners. The point was made that the statute in its application to engineers on interstate trains was a regulation of commerce among the states and repugnant to the Constitution. This contention was overruled, and the statute held to be a proper exercise of the police power in the absence of national legislation which prevented it. Speaking upon this subject, it was said, referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the states, that the power of Congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce, * * * Considered in themselves, they are parts of that body of the local law, which, as we have already seen, properly govern the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states." 124 U. S. 479, 8 Sup. Ct. 570, 31 L. Ed. 508. See, also, Hennington *v.* Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; Gladson *v.* Minn., 166 U. S. 427, 17 Sup. Ct. 627, 41 L. Ed. 1064.

It would seem to me that, within the authority of these cases and of what was said in deciding them as above quoted, it may be held that, where Congress has prescribed a general minimum limit of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not trespass upon forbidden territory and become obnoxious because, in response to special conditions prevailing within its limits, it has raised such limit of safety. There is no conflict; the

state has simply supplemented the action of the federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less, and the state had then fixed the lesser number, which was left open by the federal statute. The form of the latter fixing the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary. Such is the view which this court has taken on another occasion in the decision of a question quite identical with that here presented.

The case of Fitch *v.* Livingston, 4 Sandf. (N. Y.) 492, was brought on a bond given for the purpose of discharging a vessel which had been attached as the result of a collision occurring in the Hudson river. The question involved in the action pertained to the negligent management of the vessel for which the bond had been given, and this alleged negligence consisted in noncompliance with the statute of the state requiring such a boat in the nighttime to carry and show two lights, one at the bow and the other at the stern. The offending vessel was engaged in interstate business, and the court said: "The great point of the defense is that the propeller was not bound to carry more than one light, because she was a vessel owned in another state, navigating a river subject to the jurisdiction of Congress, under a national enrollment and license. The act of Congress of July 7, 1838, * * * makes it the duty of the master and owner of every steamboat running between sunset and sunrise to carry one or more signal lights." And the court discussed at considerable length and with much care the question whether a federal statute requiring a boat to show at least one light barred the state statute requiring it to show two lights, and it was held "that the addition of a further qualification is not in direct collision with a law prescribing the first qualification. The act of Congress does not provide that it shall be sufficient for a steamboat navigating at night to be equipped with one light only, or that, if so equipped, she shall be at liberty to navigate all waters, whether inland or on the coast. * * * The act of Congress of 1838 requires certain safeguards to be observed by steamboats, one of which is that they shall show at night at least one light. A state, finding those safeguards insufficient within its waters, adds others which are necessary to preserve life and property. There is no direct conflict." The judgment in this case, although not reported, was subsequently affirmed by this court without opinion (January 14, 1853). Furthermore, when a libel springing out of this same collision came before the Circuit Court of the United States for consideration (The Santa Claus, 21 Fed. Cas. 406, No. 12,326), the court took into consideration the fact that the vessel engaged in interstate travel did not show two lights notwithstanding that the federal statute only required one. While this view was predicated on

common-law principles instead of on the state statute referred to, it would seem indirectly to be authority for the proposition that the state statute in accordance with the rules of safety and necessity requiring two lights would have been held valid notwithstanding the federal statute.

We do not, of course, overlook the fact that the court of last resort in four of our sister states upon the precise question here involved has adopted a different conclusion than the one we are reaching (State *v.* Chicago, etc., Ry. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A. [N. S.] 326; State *v.* Mo. Pac. Ry. Co., 212 Mo. 658, 111 S. W. 500; State *v.* Texas, etc., Ry. Co. [Tex. Civ. App.] 124 S. W. 984; State *v.* No. Pac. Ry. Co., 36 Mont. 582, 93 Pac. 945, 15 L. R. A. (N. S.) 134), but necessarily, in the absence of what we regard as adverse controlling authority of the Supreme Court of the United States, we follow the views of our own court as above cited.

It has been urged, and in one or more of the decisions of other states cited above, it was held that at least the provisions of the state statute would be controlling during the period elapsing between the date of the enactment of the federal statute and the date, a year later, when it took effect, and in this connection it is pointed out that the alleged violation of the state statute in this case took effect within the period mentioned.

It seems to me that this contention is well founded and sensible. The general rule is and necessarily must be that a statute does not become controlling until it actually becomes operative. And it readily will be seen how unfortunate and paralyzing might be the results of any contrary doctrine in this case. From the passage by both Congress and state Legislatures of legislation on this subject of hours of employment we must assume that it was a subject reasonably requiring legislative regulation in the interest of the public. Congress legislating for the entire country migth have deemed it wise under all of the circumstances to allow two or even three years within which all of the different employers affected by its statute might prepare to comply with the requirements thereof. If the theory of the respondent is correct, no state within that time, however urgent or pressing the necessity and demand for prompt action under special conditions prevailing, within its borders, might pass any law which would cover even this interval because general and average conditions throughout the country might be satisfied by such a statute becoming effective at some rather remote day in the future. I do not believe that such a result should be tolerated or adjudged under the facts of this case even though it should be decided that there was a conflict between the federal and the state legislation after the former became effective.

These views were adopted in a well-reasoned opinion by the Supreme Court of Montana in State *v.* Northern Pacific Rail-

way Co., 36 Mont. 582, 93 Pac. 945, 15 L. R. A. (N. S.) 134, although that court disagreed with us in the conclusions reached on the first branch of this case.

These views lead to a reversal of the order appealed from and to an affirmance of the judgment of the trial court, with costs in both courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, and WILLARD BARTLETT, JJ., concur. CHASE, J., absent.

Order reversed, etc.

NORTHERN PAC. RY. CO. *v.* RAILROAD COMMISSION OF WASHINGTON.

(Supreme Court of Washington, May 18, 1910.)

[108 Pac. Rep. 938.]

Constitutional Law—Due Process—Regulation of Railroad.—An order of the Railroad Commission, requiring a railroad company to construct a spur track between stations to a private mill and furnish cars and facilities to the mill owner for loading the produce of his mill thereat for shipment, is a taking of its property without due process of law.

Fullerton, J., dissenting in part.

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

H. A. Burnham petitioned the Railroad Commission for an order to the Northern Pacific Railway Company, which was granted, and it appeals. Reversed and dismissed.

B. S. Grosscup, for appellant.
W. P. Bell and *W. V. Tanner,* for respondent.

GOSE, J. This appeal is prosecuted from a judgment of the superior court of Pierce county, affirming an order of the Railroad Commission requiring the appellant to construct and operate a spur track from its main line road to the sawmill of one H. A. Burnham. The appellant owns and operates a line of railroad, extending from Tacoma easterly and southeasterly through the state and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about four miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations and about 300 feet from the appellant's main-line track. He manufactures about 6 car loads per week of lumber and other sawed timbers, for shipment over ap-

pellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about 2½ miles by wagon road, at an expense of about $40 a car load for hauling and loading. With a spur track to his mill, he could put his products aboard the car for about $5 per car load. He has demanded of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track, and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand. Upon a complaint alleging these facts, and also alleging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the operation of trains, the case was heard before the Railroad Commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines. The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. A compliance with the order would require switching to the extent of about a mile, and would consume from a quarter to a half hour every time a car was taken to or from the mill.

The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the federal Constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. Healy Lumber Co. *v.* Morris, 33 Wash. 491, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964. A railroad is a public highway and, as such, is subject to regulation; but the regulation must be promotive of the public interest. Notwithstanding the fact that it is a public highway, its property is private. In Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463, speaking of the fourteenth amendment, it is said: "It would be difficult and perhaps impossible to give to those words a definition, at once accurate, and broad enough to cover every case. The difficulty, and perhaps impossibility was referred to by Mr. Justice Miller, in Davidson *v.* New Orleans, 96 U. S. 97 [24 L. Ed. 616], where the opinion was expressed that it is wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'" It is true that railroad companies may be

required to fence their tracks, establish proper crossings at points of intersection with public roads, patrol their tracks at thickly populated points, establish depots and stations, provide suitable connection with intersecting lines, adopt suitable safety appliances for the coupling of cars, properly light and heat their cars and depots, and many other things which touch the public business. The sawmill of Mr. Burnham, while an important industry, is no more a public business than a flouring mill, a dairy, a farm, a livery barn, or a manufacturing plant of any other character or description.

The case at bar falls squarely within the principle announced and applied in Missouri Pacific Railway Company v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. In that case the Supreme Court of the state of Nebraska had awarded a writ of mandamus to compel the railway company to comply with an order of the State Board of Transportation, which directed the company to grant to certain private persons the right and privilege of erecting an elevator upon the grounds of the railway company at one of its stations. The complaint upon which the order was based recited that the elevator would be used to store the cereal products of the farms and leaseholds of the complainants as well as the products of other neighboring farms. Upon a writ of error to review the judgment, the court said: "* * * The order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is in violation of the fourteenth article of amendment of the Constitution of the United States."

In Northwest Warehouse Company v. Oregon Ry. & Nav. Co., 32 Wash. 218, 73 Pac. 388, a mandamus proceeding to require the railroad company to extend its track 250 feet to a grain warehouse, to afford it loading facilities, this court said: "Under any view of the requirements of the statute, it certainly cannot be contended that appellant could have been required to build a track over land it did not own, or that it was under the duty to go out and buy a right of way for that purpose. * * *" In that case the record shows that a deed to the right of way for the extension of the track was tendered the railroad company at the time of the trial.

In Harp v. Choctaw, O. & G. Ry. Co. (C. C.) 118 Fed. 169, the railroad company had for a time permitted the owners of coal mines to load their coal from wagons onto the cars on its commercial switches. It was insisted that, if this method were discontinued, it was the duty of the company to put in a spur track

for the benefit of the mineowner. In considering that question the court said: "It must be remembered that the plaintiff in this case was not engaged in any public business, but was simply a private citizen operating the coal mine on his own account."

In Missouri Pacific Railway Co. *v.* Nebraska, decided by the United States Supreme Court since the case at bar was argued, a statute providing that: "Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made, shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants adjacent to their right of way for the purpose of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever. Provided, however, that any elevator hereafter constructed, in order to receive the benefits of this act, must have a capacity of not less than fifteen thousand bushels"—and making railroads liable for a fine for failure to obey the command of the statute, was held unconstitutional. The case arose out of two suits based upon the statute. The first was brought by the state of Nebraska to recover a fine of $500. The second was brought on the relation of the interested party, to compel the extension of a side track and the granting of shipping facilities; the railroad company having refused an application for a site for an elevator on its right of way. State *v.* Missouri Pacific Railway Co., 81 Neb. 15, 115 N. W. 614, and Farmers' Elevator Co. *v.* Same, 81 Neb. 174, 115 N. W. 757, were reversed; the court saying: "We are of the opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires." The same principle is announced in Chicago, B. & Q. R. Co. *v.* State, 50 Neb. 399, 69 N. W. 955, and State *v.* Chicago, Milwaukee & St. Paul Ry. Co., 36 Minn. 402, 31 N. W. 365.

However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the federal Constitution, as construed by the highest federal court and by this court

as well, presents, an insuperable barrier against compelling such accommodations.

The contention of the Attorney General that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and within the protective clause of the federal Constitution.

The judgment is reversed, with directions to dismiss the petition.

RUDKIN, C. J., and CHADWICK and MORRIS, JJ., concur.

FULLERTON, J. Since the Supreme Court of the United States holds that a railroad company cannot be compelled without compensation to afford facilities to a private shipper other than it offers at its general public stations, I am constrained to concur in the judgment the majority have directed to be entered in this case. I cannot concur, however, in all that is said in the opinion. I cannot concur in the view that to compel a railway company to stop at points other than its public stations and take on for carriage the property of a private shipper is taking its property for the private use of another in violation of the due process of law clauses in the state and federal Constitutions. As I understand it, the principal purpose for which a railroad is constructed is to carry from one point to another the private property of the individual; that it is for this purpose it has its existence and is given the vast powers and rights it possesses. This function, then, the state may compel it to fulfill. If, therefore, its public stations do not afford an adequate facility for the shipment of the property of a particular individual, I know of no legal reason why the company cannot be compelled, on due compensation, to furnish that particular individual with additional facilities, even to the extent of putting in an additional side track for him. For this reason I dissent from the holding that to do so is to take private property for a private use.

BLUME *v.* SOUTHERN RY. CO., CAROLINA DIVISION.

(Supreme Court of South Carolina, April 5, 1910.)

[67 S. E. Rep. 546.]

Easements — Prescription — Presumption of Grant. — Prescription rests in the presumption of a grant or dedication, and, where one has no power either to grant or dedicate, the presumption cannot arise.

Easements—Prescription—Presumption of Grant.—Neither private individuals nor the public can acquire by prescription any right to the use of the right of way of a railroad which is inconsistent with the purpose for which it was acquired or which will impair the railroad company in discharging its duties to the public.

Easements—Prescription—Presumption of Grant.*—Where no exclusive possession of a part of a railroad right of way for the statutory period under a claim of right, adverse to the railroad company, nor any use thereof for that period inconsistent with the purpose for which the right of way was acquired, was shown, no right by prescription to use any part of the right of way was shown.

Easements—Prescription—Presumption of Grant.†—A railroad either owning the fee in land for its right of way or only an easement therein cannot alien or lose by prescription any right therein compatible with the public purpose or which was necessary in discharging its public duties.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Bamberg County; John S. Wilson, Judge.

Action by W. P. Blume against the Southern Railway Company, Carolina Division. From a judgment for plaintiff, defendant appeals. Reversed.

J. F. Carter, for appellant.
S. G. Mayfield, for respondent.

HYDRICK, J. Plaintiff recovered judgment against defendant for obstructing an alleged street in the town of Bamberg, by building thereon a depot and platform, and thereby blocking the

*For the authorities in this series on the question whether title can be acquired against a railroad company by adverse possession, see foot-note of St. Louis, etc., R. Co. *v.* Rutton (Ark.), 33 R. R. R. 96, 56 Am. & Eng. R. Cas., N. S., 96; foot-note of Southern Ry. Co. *v.* Gossett (S. Car.), 29 R. R. R. 502, 52 Am. & Eng. R. Cas., N. S., 502.

†See generally, foot-note of Western Maryland R. Co. *v.* Blue Ridge Hotel Co. (Md.), 19 R. R. R. 581, 42 Am. & Eng. R. Cas., N. S., 581; third head-note of E. T. & H. K. Ide *v.* Boston & M. R. R. (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

way to and from plaintiff's residence. The alleged street is a part of defendant's right of way. Plaintiff attempted to prove title by prescription in the town to that portion of the defendant's right of way in question by showing an adverse use thereof by the public as a street for more than 20 years.

It appears that a part of the town of Bamberg has been built up along defendant's right of way, and that at least since 1894 the right of way has been laid out on a map of the town as a street, and that for many years a part of it has been worked and kept up as a street by the town authorities, and property bounding on it has been sold with reference to it as a street. It does not appear, however, that the defendant or any of its predecessors in title knew that the right of way was laid out on the town map as a street, but they knew that a part of it was worked by the town and used as a street. The testimony shows that the portion of the right of way now in question was not worked or used by the public as a street prior to the year 1897, when plaintiff purchased and built a dwelling house on the right of way, which is described in his deed as a "street, known as North Railroad avenue." But, for some 20 or 30 years previous to that time, there had been a path or road along that portion of the right of way opposite to the lot bought by plaintiff, and for some distance along the railroad. Over this road, cross-ties and wood had been hauled and deposited on the right of way for railroad purposes, and a few persons, who lived in the section beyond plaintiff's lot, went along the right of way to and from their houses; but the road or path was not generally used by the public. The depot and platform were built in 1905.

The South Carolina Canal & Railroad Company was incorporated by an act of the Legislature, and built the railroad now owned by the defendant. The act of 1833 (8 St. at Large, p. 384) provides that, in the absence of contract with the owners of the lands through which the road was built, it shall be presumed that the land on which the road was built, together with 100 feet on each side of the center of the road, has been granted by the owners thereof to the company, and that the company and its successors shall have good right and title thereto, so long as the same shall be used for the purposes of said road. In 1835 that company acquired, by purchase, the fee-simple title to a tract of land, which includes that portion of the right of way now in question. The defendant is the successor in title to the rights and property of that company.

When all the evidence was in, defendant moved the court to direct a verdict in its favor, on the ground that no use of its right of way had been proved incompatible with its use by defendant and its predecessors in title for the purposes for which it had been acquired; and, therefore, no prescriptive right to

the use thereof as a street could have been acquired by the public. The motion was refused. The facts of this case bring it squarely within the principles announced in Matthews *v.* Railway, 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286, where it was held that the public cannot acquire by prescription the right to use the right of way of a railroad company in a manner inconsistent with the company's use of it for corporate purposes. The doctrine was announced that, under our statutes, and the general principles of law, the public has an interest in the construction and operation of railroads as highways, which are burdened with duties to the public. Therefore, a railroad company cannot dispose of or so use its right of way as to impair or destroy its ability to serve the public; and that, even under the condemnation statutes, another highway cannot be laid out over the right of way of a railroad, if the construction of such other highway operates as a hindrance to the use and enjoyment of the right of way for the purposes for which it was previously procured. Prescription rests in the presumption of a grant or dedication, and, as the railroad company has no power either to grant or dedicate its right of way for any other than the purpose for which it was acquired, the presumption cannot arise; and, therefore, neither private individuals nor the public can acquire by prescription any right to use the right of way of a railroad, which is imcompatible with the purposes for which it was acquired, or which would hinder or impair the railroad company in discharging its duties to the public, imposed upon it by law.

The circuit court seems to have taken the view that the doctrine of adverse possession was applicable to the case, and the jury were charged accordingly. But the facts of the case do not bring it within the principles laid down in Railway *v.* Beaudrot, 63 S. C. 266, 41 S. E. 299, and Hill *v.* Railway, 67 S. C. 548, 46 S. E. 486. In each of those cases, a part of the alleged right of way was inclosed by a substantial fence and held in possession for the statutory period under claim of right, exclusive of any right or interest therein by the railroad company. It was held in those cases that such an assertion of right to the exclusive occupancy of the land in question was incompatible with the easement, and, if held for the statutory period, would defeat the easement. But in this case no such possession of any part of defendant's right of way was shown, and no use thereof was proved which is incompatible with the purpose for which it was acquired.

The fact that defendant owns the fee in the land, and not merely an easement, can make no difference; for if defendant cannot alien or lose by prescription an easement acquired by purchase or condemnation, neither can it alien or lose by prescription the fee in the right of way acquired by purchase. It

is not the character of the estate, but the public purpose for which it was acquired, and with which it is burdened, which takes it out of the general rule.

The verdict should have been directed for defendant.

Judgment reversed.

GARY, A. J., dissents.

LOUISVILLE & N. R. CO. *v.* PAYNE.

(Court of Appeals of Kentucky, May 4, 1910.)

[127 S. W. Rep. 993.]

Appeal and Error—Record—Conclusiveness.—Where remarks of counsel were not incorporated in any official report of his speech made by the stenographer, but the statements were taken down at the time by opposing counsel, and were in the bill of exceptions, certified to by the trial judge, the remarks were properly before the appellate court.

Trial—Remarks of Counsel.*—In a personal injury action against a railroad remarks of plaintiff's counsel, "This great corporation with millions behind it. This man singly has been making this fight against this powerful corporation since 1905, and it has been decided repeatedly in his favor. Give us as much as a railroad magnate would spend for a rosebud, give us as much as one of these magnates would tip a waiter"—were prejudicial to defendant.

Appeal from Circuit Court, Marion County.

Action by T. L. Payne against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

Benjamin D. Warfield, William C. McChord, and *William W. Spalding,* for appellant.

Hugh P. Cooper, for appellee.

CLAY, C. This is the third appeal of this case. The opinion on the first appeal may be found in 104 S. W. 752, 31 Ky. Law Rep. 1173. The opinion on the second appeal may be found in 118 S. W. 352. Having concluded that the judgment should be reversed for misconduct of counsel, we refrain from passing upon any other questions raised on this appeal.

*For the authorities in this series on the subject of arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-note of Hale *v.* San Bernardino Valley Traction Co. (Cal.), 34 R. R. R. 764, 57 Am. & Eng. R. Cas., N. S., 764.

Complaint is made of the following language used by counsel for appellee in his argument to the jury: "This great corporation with millions behind it. This man singly has been making this fight against this powerful corporation since 1905, and it has been decided repeatedly in his favor. Give us as much as a railroad magnate would spend for a rosebud; give us as much as one of these magnates would tip a waiter." It is insisted by counsel for appellee that the foregoing language was not incorporated in any official report of his speech made by the stenographer. That may be true, but the statements were taken down at the time by counsel for appellant, and are contained in the bill of exceptions, which is certified to by the judge who tried the case. The language employed is therefore properly before us for consideration.

Similar language employed by counsel for plaintiffs in the cases of Louisville & Nashville R. R. Co. *v.* Smith, 84 S. W. 755, 27 Ky. Law Rep. 257, and Louisville & Nashville R. R. Co. *v.* Crow, 107 S. W. 807, 32 Ky. Law Rep. 1145, was condemned by this court and the judgment reversed in each case. In the latter case the court said: "Great latitude is always allowed counsel in making their arguments to a jury; but that latitude cannot, and ought not to, be extended so as to permit counsel to go outside of the record and bring to the attention of the jury matters which have no bearing whatever upon the questions in issue, and which are conveyed to their notice for the sole purpose of inflaming their passions and exciting their prejudices." In the recent case of Murphy's Ex'r *v.* Hoagland, 107 S. W. 303, 32 Ky. Law Rep. 839, where counsel for contestants asked of a witness the question, "Don't you know as a matter of fact that eight (referring to the jury on the former trial) stood for breaking the will?" this court said: "The learned counsel must have known that any question which referred to the result or the partial result of the former trial of the case was very improper; in fact, inexcusable. Propounder's counsel could not permit the question to go unnoticed, and the very fact that he objected but served to emphasize its importance in the minds of the jurors." To the same effect is Illinois Central R. R. Co. *v.* Jolly, 119 Ky. 452, 84 S. W. 330, 27 Ky. Law Rep. 118. In the case before us, counsel for appellee not only attempted to excite the prejudices of the jury against appellant because it was a corporation, but he also referred to the hard struggles which appellee had had against that corporation and to the fact that the case had been repeatedly decided in appellee's favor. The subsequent withdrawal of the language complained of could not have counteracted the effect already produced upon the minds of the jury. Even an admonition of the court, which the record shows was not given, could not have accomplished this result, much less a withdrawal of the kind that counsel made. The

jury then knew that other juries had decided in appellee's favor. Considering the natural inclination of men to follow the lead of other men, this improper statement may have been sufficient to induce the verdict. That being the case, we cannot say that such misconduct is an error which did not prejudice the substantial rights of appellant.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

ATCHISON, T. & S. F. RY. CO. *v.* HAMBLE.

(Circuit Court of Appeals, Ninth Circuit, March 9, 1910.)

[177 Fed. Rep. 644.]

Railroads—Accidents to Trains—Injuries—Persons Liable—Traffic Agreement.—That defendant operated trains over the S. Company's tracks under a joint track agreement by which the latter retained full control of the movement of all trains over the track, and defendant's employees were required to take an examination for fitness before going on the same before an officer of the S. Company, which reserved the right to bar any of defendant's employees from working on or over the track, did not relieve defendant from liability for the negligence of its servants in operating trains on such joint track, resulting in a collision and injuries to a servant of the S. Company.

Railroads—Accidents to Trains—Injuries—Persons Liable—Negligence.—Where defendant was required to move its train from station to station on the track of the S. Company, under orders of the latter's train dispatcher, defendant would not be liable for injuries resulting from the negligence of the dispatcher; but, if a collision occurred, not attributable to the dispatcher's orders, but to the negligence of defendant's employees, defendant's liability would attach.

Railroads—Accidents to Trains—Injuries—Negligence—Proximate Cause—Questions for Jury.—Where defendant operated a train in charge of its own conductor over the tracks of the S. Company, under a contract for joint use, and a collision occurred due to the negligence of the S. Company's engineer in running the train at high speed past a block signal set against him, and defendant's conductor also testified that he could have seen the block signal so set if he had been paying attention, and also fusees on the track to protect the preceding train, and could have stopped his train by opening the conductor's safety valve in the caboose, but he failed to do so, and a collision occurred resulting in injury to the conductor of the preceding train, in the employ of the S. Company, whether defendant's employees were negligent, and whether such negligence was the proximate cause of the collision, were for the jury.

Atchison, etc., Ry. Co. *v.* Hamble

Trial—Instructions—Requests—Time.—Under Rev. St. § 918 (U. S. Comp. St. 1901, p. 685), authorizing the Circuit Court to make such rules regulating its practice as may be necessary or convenient for the advancement of justice, and the prevention of delays in proceedings, it was proper for the court to refuse to consider requests to charge not presented before argument, according to a rule requiring them to be presented at the close of the evidence and before argument.

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by Mark B. Hamble against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought by the defendant in error, hereafter designated as the "plaintiff," to recover damages from the plaintiff in error, hereafter designated as "defendant," for personal injuries resulting from the defendant's alleged negligence.

That part of the Southern Pacific line of railway in Southern California between Mojave and Bakersfield, a distance of about 69 miles, although a single track, is occupied jointly by the Southern Pacific Company and the defendant, the Atchison, Topeka & Santa Fe Company; the latter having a license to run its trains over this section of the Southern Pacific track. Intermediate between Mojave and Bakersfield are the stations of Tehachapi and Bealville. The track from Tehachapi near the summit of the Tehachapi Mountains to Bealville is downgrade; the average descent being about 120 feet to the mile. The line of road between these two points passes over a number of curves and through a series of 14 tunnels. To guard against collisions, the road is divided into sections of varying lengths, called "blocks," and these blocks are equipped with an effective system of automatic block signals. These signals are described by the attorney for the defendant as follows: "At the initial end, or entrance, of each block, and at the right side—the engineer's side—is a block signal consisting of a post having near its top an arm, or semaphore, pivoted near one of its ends on the post, so that it can be swung freely through an arc of 90 degrees in a plane at right angles with the block. The long end of the arm is painted red on the side visible to a train approaching the block to enter. The short end of the arm is provided with a red, a green, and sometimes a yellow round disc of glass, arranged in the arc of a circle, so that, as the arm is moved to given angles with the post, these colored glasses will severally stand opposite a light fixed near the head of the post, and will show a red, green, or yellow light to the train approaching the block entrance. Adjacent to the post is an electromagnetic

mechanism which swings the semaphore to the desired angle, and is in an electric current formed by the rails in the block and the wheels of a locomotive or car in contact with both rails. When there is no train on the block, the semaphore is at an angle of 45 degrees with the post, and the green light shows. When the forward wheels of the pony truck of a locomotive pass onto the ends of the rails at the block entrance, the semaphore swings up and stands at right angles with the post, its long arm extending away from the track, that is to the right as the train is going and the red glass in the short arm confronts the lamp. The semaphore remains in this position until the last two wheels of the last car in the train pass off of the end of the rails at the block terminus, when it drops again to an angle of about 45 degrees and shows the green light. By day the red arm at right angles, by night the red light, is a signal to enter the block, because it is clear."

The section of road with which we are immediately concerned in this case is a single block having a length of about a mile and a half extending above Bealville. The track in this block passes through four tunnels and over about the same number of curves. The lower tunnel is numbered 3, and is located above Bealville. The next above is numbered 4, the next above that is numbered 5, and the upper tunnel is numbered 6. At the upper end of this block at a point 1,400 feet above the upper end of tunnel No. 6 stands the upper block signal for this block, which gives information to a train coming down the mountain of the condition of the track throughout the entire block below. The lower block signal is below tunnel No. 3 in Bealville. There is also a cautionary signal about 200 or 250 feet above tunnel No. 4. This cautionary signal gives information to a train coming through the block as to the condition of the track approaching the station at Bealville, about 1,500 feet below the lower end of tunnel No. 4.

The movement of trains over this section is under the direction of the division superintendent of the Southern Pacific Company at Bakersfield, who gives his orders through the train dispatcher at that place. Practically the orders of the division superintendent are in fact issued by the train dispatcher.

The plaintiff on February 2, 1903, was employed as a conductor on an extra freight train No. 2,602, belonging to the Southern Pacific Company, consisting of 35 empty freight cars with an engine in front and a caboose, or way car, at the rear. This train left Tehachapi about 2 o'clock on the morning of February 2, 1903, and arrived at a point near the switch at Bealville about 6:05 a. m. The train was stopped and held at this point because the track was blocked by another train in front of Bealville. The train had passed through tunnel No. 5 and partly through tunnel No. 4. The rear end of the train, in-

cluding the caboose, stood, in the westerly end of tunnel No. 4. This tunnel is 257 feet long. The train stood about 90 feet in the westerly end of the tunnel, leaving about 167 feet of the easterly end of the tunnel clear. The distance between tunnels 5 and 4 is about 2,564 feet. The track between these two points is plainly visible from the westerly end of tunnel No. 5, except at a point from 100 to 150 feet from the westerly end of tunnel No. 5, where the track passes through a cut or curve for a distance of about 200 or 300 feet. The evidence that the block signal system was in full operation on that morning is uncontradicted. When plaintiff's train came to a standstill in and below tunnel No. 4, the rear brakeman on that train went back up the track between tunnel No. 4 and tunnel No. 5 and struck a lighted fusee on a tie and placed two torpedoes on the rail to protect the train from collision from an overtaking train. This brakeman testified that when he saw the fusee was burning out he went back to the caboose and got another fusee and two additional torpedoes. Returning up the track, he placed the second fusee and the two additional torpedoes at intervals along the track. He then heard a whistle which he thought came from the engine of his train calling him in. Upon going back he found his train still standing in the tunnel. Returning up the track he saw a headlight coming out of tunnel No. 5. This headlight was the headlight of the following train, consisting of three engines and caboose, which had left Tehachapi shortly after plaintiff's train. This train, when seen by the brakeman, had passed the block signal above tunnel No. 6 showing red, and warning this train that there was another train in the block. It passed down the track between tunnels Nos. 5 and 4, exploding the torpedoes and passing over the burning fusee set by the brakeman. It passed the cautionary signal above tunnel No. 4 showing yellow, warning the train to come to a stop, and proceeding onward entered tunnel No. 4, where it smashed into the rear of plaintiff's train, driving that train with 10 brakes set a car length ahead, smashing a caboose, and driving an oil car up into the roof of the tunnel. The plaintiff was in the caboose at the time of the collision and was carried forward in the wreckage and rendered unconscious. When he regained consciousness, he found himself on the top of a door on a level with the mouth of the tunnel and in the midst of wreckage. He crawled out on an oil car and from there to the ground. His left leg was so badly crushed that it became necessary to amputate it below the knee. From that and other injuries received at the time he was in the hospital for a greater part of two years.

At the summit that morning two engines and a caboose belonging to the defendant were coupled together as a train. The engines were numbered 781 and 784; No. 781 being in the lead. The train dispatcher issued an order that these two engines and caboose should go down the road as a train to Kern Junction

near Bakersfield as extra No. 781. Under the rules of practice of the road relating to the movement of trains, the leading engine holds the orders of the train dispatcher, and the train, when an extra, takes its number from the number of the engine. After this train had been made up in the order stated, with a conductor in the employ of the defendant in charge, the train dispatcher issued a supplemental order, which was delivered to the conductor and to the engineer in charge of engine No. 781, to couple to engine No. 2245, belonging to the Southern Pacific Company, and take it to Kern Junction. To avoid the delay in switching, this last engine was placed at the head of the train. The number of the train was not, however, changed, but retained its number as extra No. 781. This train as thus made up had an engineer in the lead in the employ of the Southern Pacific Company, two engineers in the second and third engines, respectively, and a conductor and brakeman in the caboose in the employ of the defendant. Precisely when this train left the station at Tehachapi near the summit is not clear; but, as there is no controversy on that point, it is sufficient to say that it followed plaintiff's train down the mountain, and it will be assumed that it left Tehachapi after a proper interval. It was this following train that overtook and smashed into plaintiff's train in tunnel No. 4 near Bealville, where plaintiff received his injuries.

Thereafter plaintiff brought this action, alleging that by reason of the negligence of the defendant, its servants, agents, and employees, the engineers of said two locomotive engines and conductor in charge of said train and said caboose, said train was caused to come into violent collision with the caboose at the rear end of the train of which plaintiff had charge and in which he was stationed, whereby he was injured.

The defendant in its answer alleged that in the year 1899 the Southern Pacific Company had granted to the defendant a license or privilege authorizing the defendant to run and operate engines, cars, and trains over said line of railway between Mojave and Bakersfield upon condition that the operation and movement of all such engines, cars, and trains to be operated over said line of railway by the defendant should be subject to the immediate direction, government, and superintendence of said Southern Pacific Company through its agents, and that since the year 1899 defendant had been engaged in running and operating certain of its cars, engines, and trains over said line of railway in pursuance of said license, privilege, and arrangement, and not otherwise. Defendant admitted that the train referred to in the complaint as having collided with the train in charge of the plaintiff consisted of three steam engines coupled together and drawing a caboose, or way car, and admitted that the whole of said train excepting the forward locomotive was owned by the defendant; alleged that the forward locomotive was owned and in the possession of the Southern Pacific Company, and was at

the time of the collision controlled, operated, and directed solely by the last-named company and its agents and servants; and that the train while running over said line of railway upon said occasion was under the sole direction, control, and government of the Southern Pacific Company and its agents; and denied that the collision or injuries suffered on that occasion were in any manner caused by any negligence on the part of the defendant or any or either of its servants, agents, employees, engineers, or conductors; charged that the plaintiff was guilty of carelessness, negligence, and a failure to exercise ordinary care in respect to properly guarding and protecting the train in his charge against the danger of collision with other cars, engines, and trains being operated over said line of railway at that time, and that such negligence, carelessness, and a failure to exercise ordinary care on the part of the plaintiff was the proximate cause of such collision and each and all of the injuries sustained by the plaintiff on such occasion.

Upon a trial of the case before a jury, at the conclusion of the evidence for the plaintiff the defendant moved for a nonsuit on the grounds: First, that the train of engines and caboose and everbody on it from the time the train left the summit until the collision was under the control and direction of the Southern Pacific Company and not of the defendant; and, second, on the ground that no negligence had been shown on the part of the defendant. The court granted the motion on the first ground and entered a judgment in favor of the defendant. The case was brought to this court by the plaintiff upon a writ of error, and the judgment reversed and remanded for a new trial. Hamble *v.* Atchison, T. & S. F. Ry. Co., 164 Fed. 410, 92 C. C. A. 147, 22 L. R. A. (N. S.) 323. In the opinion of this court it was held that the defendant running a train over the track of the Southern Pacific Company under a contract that they would obey the orders of the train dispatcher of the Southern Pacific Company did not relieve the defendant from liability for injuries to the plaintiff caused by the negligence of its employees operating the train and which was in no way attributable to an order of the train dispatcher. The court further held that the liability of the defendant was not affected by the fact that one of the engines attached to the train belonged to the Southern Pacific Company; that, notwithstanding the presence of this engine, the train remained in the control of the conductor, an employee of the defendant, and it was by reason of his negligence the collision occurred. Upon the second trial the evidence on the part of the plaintiff was substantially the same as at the first trial.

On the part of the defendant, in addition to other evidence, a stipulation was introduced in evidence that certain witnesses, if present, would testify that:

Under the agreement by which this track was jointly used by

the Southern Pacific and defendant, the Southern Pacific Company had sole control of the movement of trains on the said track; that the employees of the defendant were required to take an examination for fitness before going upon the same by an officer of the Southern Pacific Company, and that the Southern Pacific Company reserved in said agreement the right at any time to bar either temporarily or permanently any employee of the defendant from working at all upon or over said track.

It was agreed that the word "movement," as used in the first part of this stipulation, meant "movement of trains under the orders of the train dispatcher."

The court instructed the jury, among other things, that the conductor and other employees of the defendant on the train which collided with the Southern Pacific train of which plaintiff was conductor were defendant's servants, and that their negligence, if they were negligent, was the negligence of the defendant. In connection with this instruction, the court read that part of the opinion of this court in the former case upon that question. To this and to other portions of the instructions given by the court exceptions were taken by the defendant. It also excepted to the refusal of the court to give certain requested instructions and to the admission and rejection of certain testimony. The jury returned a verdict for the plaintiff. The case is here upon a writ of error sued out by the defendant.

E. W. Camp, A. H. Van Cott, and *U. T. Clotfelter,* for plaintiff in error.

Glen Behymer, Mattison B. Jones, and *William Freeman,* for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge (after stating the facts as above). We find nothing in the testimony on the second trial of this case calling for any change or modification of the opinion of this court upon the former writ of error. Nor do we find that the evidence calls for the application of any other or different rule of liability than there announced. Hamble *v.* Atchison, T. & S. F. Ry. Co., 164 Fed. 410, 92 C. C. A. 147, 22 L. R. A. (N. S.) 323. The fact that the Southern Pacific Company under the joint-track agreement retained full control of the movement of trains over the joint track, that the employees of the defendant were required to take an examination for fitness before going upon the same by an officer of the Southern Pacific Company, and that the Southern Pacific Company reserved in said agreement the right at any time to bar either temporarily or permanently any employee of the defendant from working upon or over said track, did not relieve the defendant from lia-

bility for the negligence of its servants in running trains over this track. The defendant was required to move its train from station to station on this track under the orders of the Southern Pacific train dispatcher, and if by reason of such orders a collision should occur between the defendant's train and another, attributable to the negligence of the train dispatcher, the defendant would not be liable for the damages resulting therefrom. But if a collision occurs which cannot be attributed to the orders of the train dispatcher, but to the negligence of the defendant's employees, the defendant cannot escape liability. We can add nothing to what has been said upon this subject in the former opinion of this court, and as there is no evidence tending in any degree to show that the collision was caused by any order or omission of the train dispatcher, or was the result of any order or omission growing out of the general control over the track exercised by the Southern Pacific Company, there was, in this aspect of the case, no question for the jury. It was a judicial question and so properly determined by the court.

The material question to be determined is whether there was competent evidence before the jury tending to show that the defendant's servants were negligent in running the train of engines and caboose through the block in which the collision occurred.

It is contended on the part of the defendant that, if the cause of the collision was the running of this train at a high rate of speed and in disregard of all signals of danger, then it was the fault of the engineer in the employ of the Southern Pacific Company in charge of the Southern Pacific engine in the lead whose negligence caused the collision; that neither of the engineers in charge of defendant's engines nor the conductor in the employ of the defendant in charge of the train had any duty to perform with respect to the speed of the train or the signals of danger displayed by the brakeman of plaintiff's train in front, or by the semaphore of the block signals showing danger because of the presence of that train in the block. The defendant, in support of this contention, introduced in evidence rule 45 of the block signal system of rules of the Southern Pacific Company, providing that:

"The signal must be observed by the engineman when the train enters and by the trainmen when the rear of the train passes out of the block."

The rule refers to the signal displayed by the semaphore under the system of block signals. Under this rule it is the duty of the engineer to notice the signal upon entering a block for the purpose of ascertaining if the block is clear. If it is clear, he can proceed; but, if it is not, it is his duty to bring his train to a stop and hold it until the block is cleared. Upon passing into a block, the forward wheels of the pony truck of the engine

passing over the tracks turns the semaphore signal at the entrance of the block to danger, where it remains until the last two wheels of the last car in the train passing over the end of the rails at the other end of the block turn the signals back, showing that the block is clear. This signal showing danger is a warning to a train in the rear to keep off the block until it shows clear. In other words, it protects the rear end of the train from collision from an overtaking train, and it is the duty of the trainmen in the rear to see that the semaphore signal which has been turned to danger by the engine of that train stands at danger when the rear of the train passes that point. But if the engine has passed into a block and has turned the signal showing that the train is in that block, it ceases to furnish information of the condition of the block in front of the train, and the trainmen cannot know its condition, unless, like the engineer, they had seen the signal before the train entered the block. This, in case of a very long train, would probably be impracticable for the conductor in the rear of the train; but it is by no means impracticable for a conductor having charge of a short train. These semaphores are large and conspicuous, and their position can be seen at a considerable distance. In this case the evidence tends to show that the semaphore stood at danger before the train, consisting of three engines and a caboose, entered the block, showing that there was a train already in the block. This train of engines and caboose was a short train, and there is no apparent reason why the engineers on the second and third engines or the conductor seated in the cupola of the caboose could not have seen the position of the semaphore upon entering the block, as well as the engineer on the first engine, and been warned that there was a train in that block. But aside from any duty these employees of defendant may have had in that respect, the important fact to be noticed is that, while the Southern Pacific engineer was in the lead and in charge of the air brakes, defendant's conductor was in charge of the train. He knew that there was a train ahead of him. The track was crowded with trains. The grade was steep, and the tunnels and curves numerous, requiring such special care and attention on the part of engineers, trainmen, and conductor as was commensurate with the increased danger of such a track. The plaintiff testified that he had observed that there were many duties for trainmen not in the rule book. "One of them," he says, "is a rule that all trainmen of all grades shall be generally watchful as to the safety of trains." This is obviously a necessary rule applicable at all times and places, and particularly on such a track as we have in this case.

Rule 75 of the Book of Rules and Regulations required that "conductors and brakemen of all trains when meeting or passing or leaving or approaching a station must be on the lookout for

signals and be prepared to do anything required for safety and dispatch." The evidence shows that this train was approaching and within a half a mile of the station at Bealville when it passed the cautionary signal about 200 or 250 feet east of tunnel No. 4. The conductor in charge of the train testified that this signal was visible from the mouth of tunnel No. 5. If it was yellow it meant to stop. If it was green it meant to go ahead. "The caution is to put the train under complete control. The light, when I saw it, was yellow."

There was evidence that this train was going about 30 miles an hour when it passed this point. The extent and character of the wreckage caused by the collision was itself, under the circumstances, evidence that the train was descending at a dangerous rate of speed, and this of itself was evidence of negligence on the part of the conductor in charge of the train. The conductor says:

"I could have stopped it by opening the conductor's valve in the caboose. That is the method provided so the conductor can stop it. That would have set the brakes and stopped the train."

Why did he not do it? This is his explanation:

"From the time I came within range of vision of this block signal until the time of the collision, I was sitting in the cupola of the caboose with my brakeman. He was on the other side of the cupola. I didn't see that signal until just as it passed by the cupola of the caboose. * * * Just as we came out of tunnel No. 5, I reached out the side window and caught the snow off the front one. There was some snow. It had been storming. It was snowing at this time slightly. I pulled this snow in the window and threw it at my brakeman over on the other side. If there had been any fusees or caution signals on that track burning as I merged from tunnel No. 5, and if I had been observing, I think I could have seen them. I didn't see the fusee until just as we went by it. After I threw this snow at my brakeman, I turned and looked out of the window, and I see this fusee."

In this state of the evidence, the question whether the defendant's employees were negligent in running this train into collision with the train on which plaintiff was riding, and whether this negligence was a proximate cause of the collision, were clearly questions to be submitted to the jury under proper instructions.

It is next contended that the court erred in refusing to receive and consider certain special instructions on behalf of the defendant; such refusal being based upon the ground that the requested instructions had not been handed to the court within the time provided in a rule of the court providing that:

"Any special charges or instructions asked for by either party must be presented to the court in writing directly after the close

of the evidence and before any argument is made to the jury, or they will not be considered."

The requested instructions were not presented at the close of the evidence, but after the close of the argument and the court was about to instruct the jury. The Circuit Court has power to make such rules regulating its "practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Rev. St. § 918 (U. S. Comp. St. 1901, p. 685). The rule requiring instructions to be presented to the court at the close of the evidence and before argument is of that character. It is a general rule and has been found useful in practice. Its enforcement was in the discretion of the court. We do not think the court abused its discretion in enforcing it in this case. The court correctly instructed the jury upon all the matters contained in the special instructions which the jury was properly required to consider. To these instructions no exceptions were taken. The defendant was, therefore, in no way prejudiced by the refusal of the court to give the special instructions in the language requested.

The remaining assignments of error are based in one form or another upon the questions we have already discussed. We do not think they call for further discussion either in relation to the admission or rejection of testimony, or in the instructions to the jury.

The judgment of the court below is affirmed.

CAHILL *v.* ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, March 15, 1910.)

[125 N. W. Rep. 331.]

Master and Servant—Injury to Servant—Negligence Connected with Operation of a Railway.*—The case is within Code, § 2071, making a railway company liable, notwithstanding the fellow-servant rule, for injury to its employee, as well as any other person, through negligence, connected with the "operation" of the railway, of any other employee, employed on or about it, where, while a section gang, engaged in repairing the track, are lifting their push car from the track, in the performance of their duty to so do on approach of a train, one of them negligently drops his corner of the car, injuring another member of the gang.

*See generally, foot-note of Texarkana, etc., Co. *v.* Anderson (Tex.), 33 R. R. R. 351, 56 Am. & Eng. R. Cas., N. S., 351; Hubbard *v.* Central of Georgia Ry. Co. (Ga.), 31 R. R. R. 769, 54 Am. & Eng. R. Cas., N. S., 769.

Cahill *v.* Illinois Cent. R. Co

Negligence—Evidence—Presumption.†—While no presumption of negligence arises from the fact that one is injured, such presumption may arise from the nature of the cause or the manner of the injury.

Master and Servant—Injury to Servant—Negligence—Evidence.—Evidence that notwithstanding it was the custom, in lifting a push car from a railroad track, to let it down, when a sufficient distance from the track, at a word of warning from the foreman or some other member of the gang, the man nearest the track let go his hold, or dropped his corner of the car, without a word of warning having been given by any one, causing the foreman, who was farthest from the track, and with his back to it, to fall, is sufficient to present a question of negligence; there being no evidence that the person lost his hold by slipping or stumbling or other cause consistent with due care on his part, notwithstanding he immediately said he "did not mean to."

Negligence—Inadvertence.‡—An act is not necessarily not negligent because inadvertent; generally speaking, the essence of negligence being inadvertence.

Appeal from District Court Buchanan County; Franklin C. Platt, Judge.

Action at law to recover damages for a personal injury. There was a directed verdict and judgment for defendant, and plaintiff appeals. Reversed.

Cook & Cook, for appellant.
Kelleher & O'Connor and *T. J. Fitzpatrick,* for appellee.

WEAVER, J. The plaintiff was a section foreman in the service of defendant at Winthrop, Iowa. In the work of repairing and mending the railway track he and his gang of three men were supplied with a push car on which tools or materials were transported or moved from place to place. It was their duty to be on the lookout for trains, and in proper time before the arrival of one to remove the push car from the track. On the day in question, plaintiff and his men were, in the line of duty, moving their car with their tools and repair material along the track to the eastward, when they discovered the approach of a train

†See last foot-note of McNamara *v.* Boston & M. R. R. (Mass.), 33 R. R. R. 588, 56 Am. & Eng. R. Cas., N. S., 588; Najarian *v.* Jersey City, etc., R. Co. (N. J.), 33 R. R. R. 466, 56 Am. & Eng. R. Cas., N. S., 466; first foot-note of Holland *v.* Northern Pac. Ry. Co. (Wash.), 33 R. R. R. 264, 56 Am. & Eng. R. Cas., N. S., 264.

‡For the authorities in this series on the subject of the definitions of actionable negligence, see first foot-note of Langenfeld *v.* Union Pac. R. Co. (Neb.), 34 R. R. R. 727, 57 Am. & Eng. R. Cas., N. S., 727; first foot-note of Wilkinson *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; second foot-note of Perryman *v.* Chicago City Ry. Co. (Ill.), 34 R. R. R. 93, 57 Am. & Eng. R. Cas., N. S., 93.

and set about the work of clearing the track. The car was furnished with a convenient handle at each of its four corners, and the gang, following the usual method, each laid hold of a handle and, lifting the vehicle, carried it to the north side of the track. The snow at that point was about 18 inches deep. It was the custom in thus removing the car to let it down at the word or call of the foreman or some other member of the gang when it had been carried to a safe distance from the track. On this occasion, when the car had cleared the north rail but a short distance, and while the plaintiff was carrying the northwest corner, some one of the other three men either purposely or accidently let go his hold, causing plaintiff to fall in such manner that he was struck by the handle or frame of the car, receiving injuries which disabled him for a year or more. Immediately as he fell, and while still under the car which had fallen on him, one of the men came to his assistance, saying: "I dropped the car and didn't mean to. Are you hurt?" This is the case as made by the plaintiff, and, as he was denied the right to go to the jury, we are required to give the testimony the construction most favorable to him.

The single question presented is whether, upon such construction of the record, we can say that a verdict for the plaintiff could be upheld. This depends in a degree upon the nature of the service in which he was employed and of the negligence of which he complains. If the negligence (if any there was) can fairly be said to have been "connected with the use and operation of the railroad on or about which he was employed," then he comes within the protection of Code, § 2071, and the fellow-servant rule will not prevent his recovery of damages. The "operation of a railway" includes something more than the transportation of freights and passengers, and the army of employees connected with its "use and operation" includes within its ranks more than those who are engaged in the moving of trains. A very appreciable proportion of the operation of a railway has to do with its maintenance and repair, and especially where such work involves the movement of engines or of cars of various kinds and uses. For instance, the statute has been held to include within its protection the shoveler unloading gravel from a gravel car (McKnight *v.* Railroad Co., 43 Iowa, 406); the shoveler in the gravel bank loading a car (Deppe *v.* Railroad Co., 36 Iowa, 52); one engaged in operating a derrick erected on a flat car (Nelson *v.* Railroad Co., 73 Iowa, 576, 35 N. W. 611); clinker man (Butler *v.* Railroad Co., 87 Iowa, 206, 54 N. W. 208); coal handlers while coaling a standing engine (Akeson *v.* Railroad Co., 106 Iowa, 54, 75 N. W. 676); track men distributing rails with the aid of an engine and cable (Williams *v.* Railroad Co., 121 Iowa, 270, 96 N. W. 774); section men in the use of a hand car (Mikesell *v.* Railroad Co., 134

Iowa, 736, 112 N. W. 201; Larson *v.* Railroad Co., 91 Iowa, 81, 58 N. W. 1076); construction car moving over a temporary track (Mace *v.* Boedker, 127 Iowa, 721, 104 N. W. 475). In the Larson Case this court cited with approval Railroad Co. *v.* Artery, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747, in which it was held that the use of a hand car by section men was an employment connected with the operation of a railway within the meaning of our statute. See, also, Smith *v.* Railroad Co., 80 N. W. 658, and Frandsen *v.* Railroad Co., 36 Iowa, 372.

It is generally held by all courts where statutes similar to our Code, § 2071, have been enacted, that the provision is intended for the benefit of those railway employees, no matter in what department or service, whose duty for the time being exposes them to dangers and hazards peculiar to the operation of railways. And surely when a man, in pursuance of his employment, rides or pushes or manages a hand car along the rails to transport tools or material or men, his service is as certainly "connected with the operation of a railway" as is the man who handles the throttle upon an engine which pulls or pushes a car loaded with gravel or other road building material. So, also, the danger to which the section hand is exposed in moving his car along the track from the approach of trains having the right of way is danger peculiar to railroading, and as his duty requires him, under such circumstances, to remove his car from the rails until the train has passed, and then to replace it and proceed, such service never ceases to be connected with the operation of the railroad, and, so far as any danger attends such service, it must be classed with the hazards of railroad operation. If the railway company should provide side tracks and switches for the benefit of sectionmen and their hand cars, their work in taking to such side tracks for the passing of trains would be so obviously connected with the operation of the railway that few would think of questioning it; and when the company obviates the necessity of side tracks and switches for such use by furnishing a car which the men can carry, and requires them to do their "switching" by lifting it bodily from the rails and replacing it when the danger has passed, we are very clear that in so doing they are still assisting in the operation of the road. This conclusion finds support in cases from other states as well as our own. Hardt *v.* Railroad Co., 130 Wis. 512, 110 N. W. 427; Steffenson *v.* Railroad Co., 45 Minn. 355, 47 N. W. 1068, 11 L. R. A. 271.

There is nothing in Dunn *v.* Railroad Co., 130 Iowa, 580, 107 N. W. 616, 6 L. R. A. (N. S.) 452, inconsistent with the view here expressed. In that case no question of the use of a hand car arose. The only inquiry there was whether the injury caused by a passing engine striking an iron bar negligently left on the track and hurling it against a section hand standing on the right

of way was of the class covered by Code, § 2071, and a majority of this court held that it was not. Until the majority recedes from that holding, it remains the law of this state for cases of that kind; but neither in fact or principle is the case at bar within the rule of that precedent. In this connection we may as well refer also to the case of Andrews *v.* Railroad Co., 129 Iowa, 162, 105 N. W. 404, which is cited by appellee as having an important bearing on the questions presented by the present appeal. In that case plaintiff was injured by the falling or dropping of a hand car which he and others were carrying. No negligence was charged against the fellow workman who dropped the car, nor was the question raised whether in carrying the car they were engaged in the operation of a railroad within the meaning of our statute. The negligence alleged was the act or omission of the foreman in permitting the coming train to get too near before clearing the track, whereby the work had to be done in such a hurry that it caused one of the men to stumble and lose his hold on the car. We held that there was no sufficient showing that the delay by the foreman was the proximate cause of the injury. The decision has little, if any, bearing upon the issue now under consideration.

We turn now to the question whether there was any evidence upon which the jury could find that there was negligence on the part of plaintiff's fellow workman in dropping the car without warning. Counsel for appellee say that no presumption of negligence arises from the mere happening of an accident. A better statement of the rule is that no presumption of negligence arises from the mere fact of injury to the plaintiff. Such presumption may and often does arise from the nature of the cause or manner of the injury. For instance, the mere fact that a trainman is injured while engaged in the line of his duty will not justify an inference of negligence on the part of his employer; but, if it appear that the injury was received in a collision between two trains of the same company moving in opposite directions on the same track, an inference of negligence does arise. The fact that a workman in a mine quarry suffers injury from the explosion of a blast will not alone entitle him to recover damages from his master; but if it further appear that he was entitled to a warning and opportunity to escape before the blast was fired, and that no warning was given, a very different rule prevails. There may have been no negligence in either case. In the one, control of an engine may have been lost from causes against which reasonable care could not have provided, and, in the other, the blast may have been prematurely ignited without fault of any one; but the injured party suing for damages has never been held to negative all such possible explanations. As is said in Railroad Co. *v.* Webb, 12 Ohio St. 475: "In proving the injury, the plaintiff * * * may and often does prove such

circumstances, under which the injury was received, as raise a presumption of carelessness or negligence, and in such case the burden of disproving the presumption by explaining the circumstances so as to render their existence consistent with the absence of any negligence would devolve upon the defendant." This rule has been applied to cases where a railway switch has been found open (Railroad Co. *v.* Johnson, 23 Tex. Civ. App. 160, 55 S. W. 772); where a car escapes and runs wild (Coal, Iron & Ry. Co. *v.* Hayes, 97 Ala. 201, 12 South. 98); where a stone is being lifted over a workman and it falls upon him (Smith *v.* Baker, 65 L. T. N. S. 467); where a girder falls from a building in the course of construction (Wight *v.* Poczekai, 130 Ill. 139, 22 N. E. 543); where a bucket used in hoisting coal is prematurely tripped (Cummings *v.* Furnace Co., 60 Wis. 603, 18 N. W. 742, 20 N. W. 665); where a steel rail was thrown from a pile without warning to those below (Railroad Co. *v.* Koehler, 37 Kan. 463, 15 Pac. 567); where a piece of timber was being handled by fellow servants, one of whom turned the stick prematurely to the injury of another (Railroad Co. *v.* Brassfield, 51 Kan. 167, 32 Pac. 814); where section hands were carrying a heavy steel rail, and one of them suddenly let go his hold causing injury to his fellow workman (Blomquist *v.* Railroad Co., 65 Minn. 69, 67 N. W. 804). Many others of similar nature might be cited.

In the case at bar the evidence tended to show that, in lifting the car from the track, it was the custom of the gang to give a word of warning when ready to set it down. The plaintiff was foreman, and the one from whom the word would naturally be expected, though under the evidence it might perhaps be given by any one of the gang. The foreman was at the northwest corner substantially in the direction the car was being carried. He was faced away from the car with the handle lifted about his hip and somewhat behind him. The man Penny was at the southwest corner, and it was he, as plaintiff testifies, who let go his hold or dropped the car; no word of warning having been given by any one. These facts are, in our opinion, sufficient to make the question of due care on the part of Penny one for the consideration of the jury. The fact that he dropped his corner of the car and did it without warning is shown. There is nothing, except his exclamation or statement to which we shall soon refer, to show that his act was not voluntary or due to his carelessness. Such being the case, and no explanation or denial appearing, the jury could rightfully find, if indeed it was not bound to presume, that the act was a voluntary one, or one of pure heedlessness.

Does the statement made by Penny: "I dropped the car. I didn't mean to. Have I hurt you"—introduce any element into the case which obviates the result above indicated? We think not. Independent of this statement, there is evidence that he is the one who dropped the car, and the effect of that proof is not

neutralized by his declaration that he did not mean to do it. But even conceding the literal truth, it is inconsistent with his alleged negligence. Counsel is not correct in the assumption that, if an act is inadvertent, it is therefore not negligent, for, generally speaking, the very essence of negligence is inadvertence. Only the malignant or vicious intend injury to others, and such intentional injury is willful, but not negligent in the proper sense of the word. Were there any evidence here that Penny lost his hold by reason of slipping or stumbling, or other cause consistent with due care on his part, the cases of Bolsem *v.* Railroad Co., 140 Iowa, 73, 117 N. W. 1098, and Tibbets *v.* Railroad Co., 138 Iowa, 178, 115 N. W. 1021, and other precedents of that class cited by appellee would be pertinent; but the record discloses nothing except that Penny, whose duty it was to hold up his corner until the word was given, dropped it. Presumptively such act was voluntary, and, being a violation of the duty which he owed to others engaged in lifting the car, it was negligent. His statement after the injury that he "did not mean to" may have been, and probably was, competent evidence as a part of the res gestæ; but it would be going entirely too far to say it was conclusive of the question of his due care.

For the reasons stated, it was error to direct a verdict, and the judgment appealed from is therefore reversed.

DETROIT, T. & I. RY. CO. *v.* STATE.

(Supreme Court of Ohio, March 15, 1910.)

[91 N. E. Rep. 869.]

Railroads—Commerce—Operation of Road—Use of Automatic Coupler.*—Section 3365—27b, Revised Statutes of Ohio (98 O. L. 76), making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state to haul, or permit to be handled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars, is a valid and reasonable exercise of the police power of the state; it does not directly regulate interstate commerce or conflict with regulations thereof enacted by Congress, but requires the use of the same kind of automatic couplers required by the act of Congress, and therefore is not void on the ground that it is in contravention of the exclusive power of Congress to regulate commerce among the states.

Railroads—Automatic Couplers—Interference with Interstate Traffic.—A common carrier using a car in violation of the statute is not immune from the penalty therein provided because the car, or the railroad on which it was being hauled, is commonly used in interstate traffic, or because it was in a train containing cars loaded with interstate traffic.

(Syllabus by the Court.)

Error to Circuit Court, Jackson County.

Action by the State against the Detroit, Toledo & Ironton Railway Company. Judgment for plaintiff was affirmed by the circuit court, and the railroad company brings error. Affirmed.

Alexander L. Smith and *John Robbins,* for plaintiff in error. *U. G. Denman,* Atty. Gen., *Freeman T. Eagleson,* and *D. H. Armstrong,* Pros. Atty., for defendant in error.

SUMMERS, C. J. This action was commenced in the court of common pleas of Jackson county to recover a penalty for the violation of the statute making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state "To haul, or permit to be hauled, or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of

*See generally, last foot-note of Hockfield *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 492, 57 Am. & Eng. R. Cas., N. S., 492.

men going between the ends of the cars," passed March 19, 1906. Section 3365—27b, Revised Statutes (98 Ohio Laws, p. 76).

It is averred in the petition that the defendant hauled and used a car in this state for moving state traffic not equipped as required by the statute. The defendant, for answer, pleaded two defenses: First, that it is a railroad corporation incorporated under the laws of the state of Michigan, and that it owns and operates a railroad from the city of Detroit in that state to the city of Ironton in the state of Ohio; that it was engaged in interstate commerce, and that all its locomotives and cars, including the locomotive and all cars in the train described in the petition, were frequently and commonly used and engaged in said interstate traffic. "That by reason of the premises all of the business of this defendant involving the use and operation of its said railroad and equipment is subject to the exclusive power of the Congress of the United States to regulate commerce among the several states, which power has been exercised by said Congress in the several acts to regulate interstate commerce and carriers of interstate traffic, to wit." Then reference is made, among others, to the so-called safety appliance act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended April 1, 1896, c. 87, 29 Stat. 85, and March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143). It is then averred that the state statute is in conflict with these acts of Congress, and is therefore, void. The second defense is to the effect that the car in question was in a train of cars, including a number of cars being used in moving interstate traffic, and that it was, therefore, exclusively within the regulations of Congress. A general demurrer was filed to each defense and sustained, and a judgment for plaintiff entered. The circuit court affirmed, and error is prosecuted here.

The admitted facts are that the defendant is a common carrier operating a railroad in moving interstate and intrastate traffic, that the car in question was at the time complained of in use in moving state traffic, that the car, and the railroad over which it was being hauled, were commonly and usually used in interstate traffic, and that the car was in a train in which there were a number of cars loaded with interstate traffic. Counsel for plaintiff in error contend in effect, that the statute is void on the ground that Congress, under the authority conferred upon it by the Constitution (article 1, section 8, subd. 3), to regulate commerce among the several states, having enacted regulations respecting automatic couplers on cars upon railroads engaged in interstate traffic, the state is without power to legislate upon the subject, or to prescribe the kind of couplers for a car in use in hauling intrastate traffic, if the car is commonly used in interstate traffic, or is in a train, some of the cars of which are

in use in interstate traffic, or is on a railroad engaged in interstate traffic. Or to quote them, they say, "The questions are:

"(1) Does the fact that the car in question was commonly and usually employed in interstate traffic, although it was at the particular time actually carrying intrastate traffic, subject it to the federal control in such wise as to take it out of the state control?

"(2) Does the fact that it was part of a train containing other cars loaded with interstate traffic (and which are therefore subject to the federal act), have the effect to bring this particular car also within the operation of the federal act in such wise as to take it out of state control?

"(3) Does the fact that the railroad was commonly and usually employed in interstate commerce and that defendant was engaged in business as an interstate carrier, have such effect?"

And their contention is that each question should receive an answer in the affirmative.

If the statute regulates interstate commerce, or enacts regulations in conflict with valid federal regulations of such commerce, it is invalid. In Atlantic Coast Line Railroad Co. *v.* Wharton *et al.*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230, it is held that, "Any exercise of state authority, whether made directly or through the instrumentality of a commission, which directly regulates interstate commerce is repugnant to the commerce clause of the federal Constitution." The statute in question does not purport to be a regulation of interstate traffic, but is limited strictly to the moving of traffic from one point to another in the state, and it is evident from its various requirements as well as its title, that it was passed in the exercise of the police power of the state to promote the safety in the state of employees and travelers upon railroads, and without any thought or intention of meddling with interstate commerce.

The original safety appliance act so called, passed March 2, 1893, by Congress was entitled as follows: "An act to promote the safety of employees and travelers upon railroads by compelling common carriers, engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

Section 2 of that act provides as follows: "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

And by the amendment of March 2, 1903, it was further pro-

vided that the provisions and regulations of this safety appliance act "Shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce * * * and to all other locomotives, tenders, cars and similar vehicles used in connection therewith." 32 Stat. p. 943 (U. S. Comp. St. Supp. 1903, p. 367, Supp. 1909, p. 1143).

Whether the original act of Congress, properly interpreted, applies to cars while not employed in interstate traffic, and whether the amendment in so far as it attempts to regulate cars while not so engaged in interstate traffic does not transcend the powers of Congress, we need not consider.

In Voelker *v.* Chicago, M. & St. P. Ry. Co. (C. C.) 116 Fed. 867-873, in referring to the act of Congress of 1893, Shiras, District Judge, says: "Legislation on this matter of the use of automatic couplers was sought and obtained from Congress, as well as from the state Legislature; so that the companies would not be afforded a loophole for escape from liability on the theory that the agencies used in interstate commerce are without the control of the state legislation." And in the same case in the Circuit Court of Appeals, before Sanborn, Thayer, and Van Devanter, Circuit Judges (Chicago, M. & St. P. Ry. Co. *v.* Voelker, 129 Fed. 522-527, 65 C. C. A. 226, 231, 70 L. R. A. 264), Van Devanter, C. J., says: "The two statutes, federal and state, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief, and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of any one going between, or at least entirely between, the cars." Our statute does not conflict with the federal statute in the character of the coupler required, but requires the same kind of coupler, and was passed to promote the same object, though under a different power, and, while no doubt it was enacted to apply to cases assumed not to be covered by the federal statute, it is not unreasonable, and is not void merely because a failure to equip the car with automatic couplers would subject the railroad company to punishment under a state statute as well as under the act of Congress. "The same act or series of acts may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government." Cross *v.* North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287. The regulation of commerce among the states is within the exclusive jurisdiction of Congress, but it is well settled that a state statute, enacted in the exercise of its police power, not regulating or directly affecting interstate commerce or in conflict with federal regulations, but merely regulative of the instrumentalities of commerce, is not void; and when such state regulations do conflict with federal regula-

tions they are not void on the ground that the state has exercised a power exclusively in Congress, but because the Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land.

It is unnecessary to cite the cases by which these principles are established; they are cited in the following very recent cases upon which we base our decision: In Asbell *v.* Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, where a statute of the state of Kansas making it a misdemeanor to transport cattle into the state without inspection was upheld against the contention that it interfered with interstate commerce, and also conflicted with a statute of the United States and the rules and regulations of the department of agriculture, it is held: "While the state may not legislate for the direct control of interstate commerce, a proper police regulation which does not conflict with congressional legislation on the subject involved is not necessarily unconstitutional because it may have an indirect effect upon interstate commerce." In Missouri Pacific Railway Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 252, in which a peremptory writ of mandamus was allowed by the Supreme Court of Kansas, commanding one railroad company to transfer cars to and from a mill on another railroad, and which was affirmed, it is said by Mr. Justice Brewer: "The roads are, therefore, engaged in both interstate commerce and that within the state. In the former they are subject to the regulation of Congress; in the latter to that of the state, and to enforce the proper relation between Congress and the state the full control of each over the commerce subject to its dominion must be preserved." Again he says, page 623 of 211 U. S., page 218 of 29 Sup. Ct. (53 L. Ed. 252): "Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained." Mr. Justice Moody, dissenting, page 624 of 211 U. S., page 219 of 29 Sup. Ct. (53 L. Ed. 252), says: "I venture to think that the weight of authority establishes the following principles: The commerce clause of the Constitution vests the power to regulate interstate commerce exclusively in the Congress and leaves the power to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the state may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress

enacts legislation conflicting with it, to which it must yield as the paramount power. Gibbons *v.* Ogden, 9 Wheat. 1, 204 [6 L. Ed. 23]; Atlantic Coast Line *v.* Wharton, 207 U. S. 328, 334 [28 Sup. Ct. 121, 52 L. Ed. 230]; Asbell *v.* Kansas, 209 U. S. 251 [28 Sup. Ct. 485, 52 L. Ed. 778]."

It follows that the questions propounded by counsel should receive a negative answer, and the judgment is affirmed.

Judgment affirmed.

CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

CHESAPEAKE & O. RY. CO. *v.* LANG'S ADM'X.

(Court of Appeals of Kentucky, Oct. 26, 1909.)

[121 S. W. Rep. 993.]

Master and Servant—Injury to Servant—Negligence after Discovered Peril.—Direction to find a verdict for defendant in an action against a railroad company for the killing by a train of its section hand while riding by permission a velocipede on its tracks was properly refused; the evidence for plaintiff being that no warning of the approach of the train was given, that deceased was ignorant of its approach, and that it might have been checked, if not stopped, after he was seen by the engineer, in time to avoid the accident.

Evidence — Opinions — Qualification of Witnesses. — Witnesses, while not knowing the engine or cars of a train, having run other trains, are competent to testify as to the distance within which such a train could be stopped.

Master and Servant—Injury to Section Hand on Track—Liability of Company.*—The place on a railroad track where a section hand riding a velocipede by permission was struck by a train being outside the town, and where the presence of persons was not to be expected, the company was liable only in case there was negligence after his peril was discovered; it having been incumbent on him to keep a lookout for, and get out of the way of, trains.

Trial—Instructions—Conformity to Evidence.—There being no evidence that the peril of a section hand on the track was discovered by any one except the engineer of the train which struck him, instructions as to "agents and servants" of the company in control and management of the train having discovered him, and not used proper care to prevent the injury, should use the word "engineer" in place of the words "agents and servants."

*For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on tracks before their presence is discovered, see first foot-note of Florida Ry. Co. *v.* Storky (Fla.), 34 R. R. R. 410, 57 Am. & Eng. R. Cas., N. S., 410; Miller's Adm'r *v.* Illinois Cent. R. Co. (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396.

Cheasapeake & Ohio Ry. Co. *v.* Lang's Adm'x

Master and Servant—Injury to Sectionman on Track—Care Required of Engineer.†—The engineer of a train, on discovering the peril of a section hand on the track, was not bound to use the utmost diligence to prevent his injury, but only such care as might be reasonably expected of a person of ordinary prudence under the circumstances.

Master and Servant—Injury to Section Hand on Track—Duty of Engineer—Instructions.—In place of the words "promptly used all the means in his power" in the instruction, in an action against a railroad company for the killing of its section hand by its train, that if the train was being run by the engineer in an ordinarily careful and prudent manner, and, after discovering decedent's peril, he "promptly used all the means in his power" to prevent the accident, defendant was not liable, there should have been inserted the words "used ordinary care in the exercise of all reasonable means at his command consistent with the safety of the train."

Master and Servant—Injury to Section Hand—Liability Notwithstanding Servant's Negligence.‡—Though a section hand was guilty of negligence in going on the track with his velocipede knowing that a train was coming, the company was liable for his death from being struck by the train, if, after it discovered his peril, it did not exercise ordinary care to avoid injuring him.

Master and Servant—Injury to Servant—Assumption of Risk.—Where a section hand riding a velocipede on the track, knowing of the approach of a train, jumped off, and was safe from the train, and then trying to get his velocipede off the track, when it was too late for those in charge of the train to do anything to avoid injuring him, was struck and killed by it, he assumed the risk, and the company was not liable, unless he had reason to believe the velocipede endangered the train, and he used such care as may be reasonably expected of a person of ordinary prudence situated as he was.

Pleading—Disjunctive Allegations—Injury to Servant—Negligence after Knowledge of Peril.—The allegation in the petition for death of a section hand struck by a train that the persons in charge of the train saw or could have seen by ordinary care his danger is only one that they could have seen, and does not involve one that they saw his peril.

Nunn, C. J., dissenting.

†For the authorities in this series on the subject of the care due from trainmen to licensees or trespassers on tracks after their danger is discovered, see second foot-note of Miler's Adm'r *v.* Illinois Cent. R. Co. (Ky.), 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396; San Antonio, etc., Co. *v.* Hodges (Tex.), 33 R. R. R. 457, 56 Am. & Eng. R. Cas., N. S., 457.

‡See first foot-note of Neary *v.* Northern Ry. Co. (Mont.), 31 R. R. R. 758, 54 Am. & Eng. R. Cas., N. S., 758; first foot-note of Norfolk & W. Ry. Co. *v.* Dean's Adm'x (Va.), 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784.

Chesapeake & Ohio Ry. Co. *v.* Lang's Adm'x

Appeal from Circuit Court, Mason County.

Action by Anthony A. Lang's administratrix against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Worthington, Cochran & Browning, for appellant.
Thos. D. Slattery, for appellee.

HOBSON, J. Anthony A. Lang was a section hand in the service of the Chesapeake & Ohio Railway Company. It was a part of his duty to act as track walker between South Ripley and Dover, a distance of about six miles. One of his duties was the lighting of the signal and switch lights between these points, and to save time he was allowed to use a velocipede. On December 19, 1905, he had been to South Ripley, and was returning to Dover, where he lived. Just before the road reaches Dover it passes over a trestle. While Lang was going over this trestle, a rapid moving passenger train came up behind him, knocking him off the track and killing him. This suit was brought by his personal representative to recover for his death, on the ground that those in charge of the engine and train perceived his danger, and, after perceiving it, could by proper care have avoided killing him. There was a verdict and judgment in the plaintiff's favor for the amount sued for, $2,000, and the railroad company appeals.

One witness, who lived about 100 feet from the railroad track and about 800 feet east of the trestle, testified that he was sitting in his room, and saw Lang go by on the velocipede. He seemed to be going along very leisurely. The witness then got up and went into his kitchen, and just as he got into the kitchen he heard the whiz of the passenger train. He was uneasy about Lang, for he had seen him pass, so he stepped to the window to see if he had gotten across the bridge, and, as he reached the window, he saw him at the end of the bridge, and the witness could only see him halfway across the bridge. The train was only about 100 feet behind decedent when the witness last saw him. The train did not whistle or give any signal until after it had gotten beyond the bridge. Another witness testified that she lived just west of the bridge. She was tired and went to the window. She saw Lang going by, and watched him until he got about across the bridge. While she was standing there the train came along. She looked until it got close to him. She turned her eyes, and the train struck him. The window at which she was standing faced the bridge. She also testified that there was no whistle or ringing of the bell until after Lang was struck. Lang did not look back, so far as she saw. The train was an extra, consisting of an engine and three baggage cars, running at the rate of 45 or 50 miles

an hour. There was proof on behalf of the plaintiff that it could have been stopped in 400 or 500 feet.

The conductor of the train testified that he was in the rear car, and that the engineer whistled and put on the emergency brakes on the curve before reaching the straight track approaching the trestle. The track was straight for about 800 feet east of the point where Lang was struck. The engineer testified that he was two or three rail lengths west of the distance signal when he first saw Lang. A rail length is 33 feet. The distance signal was 780 feet from the point where Lang was struck; so, according to his testimony, Lang was about 700 feet from him when he saw him. He said he saw Lang when he came around the curve into the straight track. The fireman was busy shoveling coal, and did not see him at all at that time. The engineer testified that he at once set his emergency brakes and blew the alarm whistle; that Lang was at about the end of the viaduct, and got off of the velocipede, and was trying to pull it from the track, when he was struck and killed. The fireman testified that, after the alarm was given, he looked out and saw Lang trying to pull the velocipede from the track when he was struck. On the other hand, the section hands who were working on the track a little below the trestle testified that no warning of the approach of the train was given until after Lang had been struck; and two persons walking east along the track, who passed Lang a short distance from the trestle, gave similar testimony.

It is insisted for the defendant that the court should have instructed the jury peremptorily to find for it; but we cannot concur in this conclusion. If a signal of the approach of the train had been given, Lang might have protected himself by jumping from the velocipede. The evidence for the plaintiff was that no warning of the approach of the train was given, and that Lang was struck when he was proceeding along in ignorance of the approach of a train behind him. In addition to this, there was evidence tending to show that the train might have been checked, if not stopped, in time to avert the catastrophe. While the witnesses who testified for the plaintiff did not know this engine or these cars, they had run other trains and were competent to testify as to the distance within which such a train could be stopped. The evidence shows that Lang was seen by the engineer when he came around the curve into the straight track, and, if he had whistled then, Lang could, at least, have jumped from the velocipede. It is true the testimony for the company is to the effect that the engineer did blow the whistle then, but the great weight of the evidence is to the effect that no whistle was blown until after Lang had been struck and the train was some feet west of the point at which the accident occurred.

The court gave the jury these instructions:

"(1) The court instructs the jury that if they believe from the evidence that the decedent, Anthony Lang, was on the 19th of December, 1905, while riding on a velocipede on the track of defendant's railroad, killed by being run into by an engine of defendant as described in the proof, and if they further believe that at the time of such injury and killing he was upon the track in the usual course of his employment by said railroad company, and that the agents and servants of said railroad company in control and management of the train after discovering the peril of decedent Lang failed to use the utmost diligence to prevent his injury, then they will find for the plaintiff.

"(2) If the jury believe from the evidence that at the time of the killing of decedent, Lang, the train was being run by the agents and servants of the defendant railroad in an ordinarily careful and prudent manner, and that after the discovery of the decedent, Lang's, peril they promptly used all the means in their power to prevent the injury, then they will find for the defendant.

"(3) If the jury believe from the evidence that the decedent was himself guilty of such negligence that as without his negligence the injury would not have happened, notwithstanding the defendant may have been guilty of negligence, still the law is for the defendant, and the jury will so find.

"(4) If the jury finds for the plaintiff, they should assess the damages at such sum as will fairly compensate the estate of the decedent for the destruction of his power to earn money, not to exceed, however, the sum of $2,000, the amount claimed in the petition.

"(5) The jury are instructed that the rate of speed of defendant's train prior to the time its engineer saw the peril of Lang was not negligence. Defendant had the right to run its train at the speed that it was running."

The court did not err in telling the jury that the defendant was only responsible in case there was negligence after the peril of Lang was discovered. The point at which he was struck was one where the presence of persons on the track was not to be expected. It was outside of the town limits, and there was no reason why the presence of persons at this point should be anticipated. It is true Lang was not a trespasser. He had a right to be on the road with a velocipede; but it was incumbent on him to keep a lookout for trains and get out of their way. Those in charge of the train had no reason to anticipate his presence on the trestle, and were not required to keep a lookout for him. But they were required to exercise proper care to avoid injuring him after his peril was discovered. There was no evidence that his peril was discovered by any one but the engineer, and in instructions 1 and 2, in lieu of the words

"agents and servants," the court should have used the word "engineer." The engineer was not required to use the utmost diligence to prevent his injury after he discovered his peril. He was required to exercise such care as might be reasonably expected of a person of ordinary prudence under the circumstances. The court, therefore, erred in telling the jury that the company was liable if the engineer failed to use the utmost diligence to prevent the injury.

In the second instruction, in lieu of the words "promptly used all the means in their power," the court should have inserted these words, "used ordinary care in the exercise of all reasonable means at his command consistent with the safety of the train." Hovius *v.* Cincinnati, etc., Ry. Co., 107 S. W. 214, 32 Ky. Law Rep. 786; Flint *v.* Illinois Central R. R. Co., 88 S. W. 1055, 28 Ky. Law Rep. 1.

The defendant introduced proof on the trial to the effect that Lang, before leaving the last station, received warning from the station master that this passenger train was coming, and it is insisted for the railroad company that, if he received this warning, he was guilty of negligence in going upon the track with his velocipede in front of the passenger train. But, although he was guilty of negligence in thus going upon the track, the defendant would still be liable if, after it discovered his peril, it did not exercise ordinary care to avoid injuring him; and, as the plaintiff cannot recover in any view of the case except for negligence after his peril was discovered, no instruction should be given based upon this evidence. There was proof for the defendant to the effect that Lang, after he knew of the approach of the train and after he had jumped from his tricycle and was safe from the train, lost his life in an effort to get his tricycle off the track. When he did this, it was too late for those in charge of the train to do anything more than they had already done to avoid injuring him; and, if with knowledge of the approaching train and when he was safe from it he thus put himself in danger in an effort to save the tricycle when it did not endanger the train, he cannot recover. The proof for the plaintiff does not sustain this view of the transaction, but it is supported by the proof for the defendant. A person may lawfully imperil his life to protect the lives of the persons on a train. In lieu of the third instruction, the court will tell the jury that if they believe from the evidence that Lang jumped from the tricycle, and when he was at a point of safety, with knowledge of the approach of the train, undertook to take the tricycle off the track and thus lost his life, he took the risk and the defendant is not liable, unless he had reason to believe the tricycle endangered the train, and he used such care as may be reasonably expected of a person of ordinary prudence situated as he was. Nelling *v.* Chicago, etc., Ry. Co., 98

Iowa, 554, 67 N. W. 404; Wright *v.* Southern Railway Co. (C. C.) 80 Fed. 260; Illinois Central *v.* Jackson, 65 S. W. 342, 23 Ky. Law Rep. 1405; Louisville & Nashville R. R. Co. *v.* Molloy's Adm'x, 122 Ky. 219, 91 S. W. 685, 28 Ky. Law Rep. 1113; Barber *v.* Cincinnati, etc., R. R. Co., 21 S. W. 340, 14 Ky. Law Rep. 869; Becker *v.* Louisville & Nashville R. R. Co., 110 Ky. 474, 61 S. W. 997, 22 Ky. Law Rep. 1893, 53 L. R. A. 267, 96 Am. St. Rep. 459.

We see no other prejudicial error in the record. The petition is defective, in that it does not aver that those in charge of the train saw the peril of the deceased, and, after perceiving it, were negligent as therein alleged. The allegation that they saw or could have seen by ordinary care is only an allegation that they could have seen. On the return of the case the plaintiff may amend her petition.

Judgment reversed and cause remanded, with directions for a new trial consistent with this opinion.

NUNN, C. J., dissenting.

LEGGETT *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, March 9, 1910.)

[67 So. Rep. 249.]

Master and Servant—Assumption of Risk—Master's Negligence.*—While an employee assumes risks naturally incident to the work, he does not assume those arising exclusively from the employer's negligence.

Master and Servant—Injuries to Servant—Master's Knowledge of Defects.†—Since a railroad company is bound to provide a reasonably safe roadbed for the protection of its train employees, it is conclusively presumed to have knowledge of the unsafe condition of its tracks over which its trains run.

Master and Servant—Injuries to Servant—Sufficiency of Evidence—Proximate Cause.—In an action for the death of a brakeman who was found on the track after having fallen from a freight train, evidence held to sustain a finding that the bad condition of the track and the violent jarring of the cars threw intestate between the cars, causing his death.

Appeal from Superior Court, Martin County; Cooke, Judge.

*See first foot-note of Silvia *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

†See generally, second paragraph of second foot-note of Thomas *v.* Wisconsin Cent. Ry. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

Leggett v. Atlantic Coast Line R. Co

Action by McG. Leggett, administrator, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

These issues were submitted:

(1) "Was the plaintiff's intestate killed by the negligence of the defendant company as alleged? Answer: Yes."

(2) "Did the plaintiff's intestate, by his own negligence, contribute to his death? Answer: No."

(3) "What amount of damages is the plaintiff entitled to recover? Answer: $7,229."

From the judgment rendered the defendant appealed. The facts are stated sufficiently in the opinion of the court.

F. S. Spruill and *H. W. Stubbs,* for appellant.

A. R. Dunning, for appellee.

BROWN, J. There are no assignments of error relating to the reception or rejection of evidence, and we think that all the other assignments of error, relating to the charge of the court, may be considered in passing upon the motion to nonsuit. This motion and the several exceptions to the charge are based upon the contention that there is no evidence that the alleged negligence of the defendant was the proximate cause of the intestate's death. The doctrine of assumption of risk has no application here, for it is not contended by plaintiff that he is entitled to recover unless he should satisfy the jury that the cause of the death of his intestate was the negligence of the defendant. It is elementary that, while an employee assumes all those risks naturally incidental to the work, he does not assume those arising exclusively from his employer's negligence.

The evidence offered by the plaintiff tends to prove that the intestate was a brakeman on defendant's freight train running on defendant's belt line around Wilmington. The duties of the train on which he was employed were to shift cars around the belt line to and from the Wilmington yard and the several factories on the belt line; to take out empty cars that had been unloaded, and put in cars loaded with material for the factories, and vice versa. On the night of the accident the engine, with its crew of men, one of whom was the plaintiff's intestate, was at an industrial plant on the belt line known as the Standard Turpentine Works. The train was made up of an engine running tender forwards, pushing two empty box cars and one empty flat car; immediately next the engine in the string of cars being drawn was the one empty flat car. When the work at the Standard Turpentine Works was finished, the signal indicating that the work was done, and directing the engineer to go on into the Wilmington yards, was given by the plaintiff's in-

testate, who was then standing on the box car next to the flat car that was attached to the head of the engine. The crew were then six or seven miles out from the Wilmington yards. In response to the signal given by the plaintiff's intestate the engineer started with his train back to the Wilmington yards. When the train arrived at Fernside junction, on the way into Wilmington, the engineer discovered that the plaintiff's intestate was missing. The train at once backed back on the track, taking the engine with the flat car at the head of it and the two wood-rack cars behind, and leaving the other cars in the switch at the Delgado Cotton Mills. They found plaintiff's intestate lying across the track dead, his body cut in two parts evidently by the train passing over it.

There is abundant evidence in the record that about where the body was found the track was in a fearfully bad condition, quicksand foundation, and water running across the track; that there was a very rough place in the track just where intestate's shoes were found. In fact the evidence is not contradicted that the entire track of the belt line is in a most unsafe and dilapidated condition. That the defendant is conclusively presumed to have knowledge of it is beyond controversy, because one of its obligations to its employees, as well as to passengers, is to provide a reasonably safe roadbed. Thomas *v.* Railroad, 131 N. C. 592, 42 S. E. 964. There is evidence that, while the train was speeding towards Wilmington at 12 miles an hour over this rough, uneven, and sinking track, the intestate, as brakeman are called upon to do, was moving along the cars, presumably in the discharge of his duties. It is contended that he fell between the cars and was run over. We think it quite plain from the undisputed evidence that the intestate met his death in this manner. We have no difficulty in holding that the evidence warrants the reasonable inference that the rough condition of the track was the cause of the fall. This is manifest when we consider its condition at and about the place where the body and the shoes were found.

There is another ground of negligence alleged, and supported by evidence of the witness David Baldwin. He testified that on the evening of October 3, 1907, at about 6:30 o'clock, he was coming home from hunting, and passed within about 15 or 20 steps of the track of the belt line; that while he was there, a freight train passed him with two wood-rack cars in front of the engine, and eight or ten cars behind it, going towards Delgado Mills; that he saw a man on the rear part of the train, sitting on the car, his feet hanging down between the cars. He had his lantern, and his right hand on the brake; that about half the distance between Sixth and Seventh streets the train was going a pretty good speed, and stopped all at once, and those cars rushed on the engine and made a most violent slam-

ining and jarring of the cars, and then train started again; that after the sudden stopping of the train, he did not see the man again; that the next morning he was down at the track, and at the point where the cars slammed together, he saw evidences of blood, etc., on the ground. At this place the track was in very uneven, rough, and bad condition. Although this witness may be in error as to the number of cars, the description of the train, and the position of the brakeman, yet his evidence is to be considered by the jury upon the main question of negligence. His discrepancies may effect his credibility, but he testifies unequivocally to the violent jarring and slamming. He also testifies to the blood, and it was not far from where the body was found. Undoubtedly the blood testified to by Baldwin came from the intestate's body. It is not claimed that any one else was killed or hurt on the belt line that night. That the evidence, taken as a whole, was sufficient to go to the jury, and warrants the reasonable inference that the bad condition of the track and the violent "slamming" of the cars and stopping of the train threw the intestate off his balance between the cars and caused his death is hardly debatable. With deference for the argument of the learned counsel for defendant, we cannot resist coming to that conclusion ourselves, although we are not triers of the fact.

We find nothing in the evidence to support the plea of contributory negligence, and we find no assignment of error in the brief bearing upon the issue of damage.

No error.

SMITH *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas, March 12, 1910.)

[107 Pac. Rep. 635.]

Master and Servant—Assumed Risk—Reliance on Care of Master.* —A railway engineer is not bound to know every defect existing in the ties and rails of the track over which he runs his engine. If the track, ties, and rails are in place, he has the right to assume that the company has discharged its obligation to keep them in reasonably safe repair.

Master and Servant—Assumed Risk—Defects Not Known to Servant.†—In an action by a railway engineer against the company to recover for personal injuries received in the derailment of his engine caused by defective ties and rails, where the defects had existed for such a length of time that the railway company was bound to have notice of them, and where it was shown that the engineer had no knowledge of the defects and no opportunity of knowing of their existence except such as came to him in operating his engine over the track, held, that the risk as to the condition of the roadbed was not one which he assumed.

Master and Servant—Injury to Servant—Waiver of Notice.—In the action mentioned in the preceding paragraph, the answer set up as a defense the failure of the plaintiff to give 30 days notice in writing of his claim for injuries as provided in the contract of employment. At the trial the plaintiff without objection testified that some one from the claim department of the company came to his house three weeks after the accident and took from him a written statement concerning the accident and his injuries. The defendant then introduced in evidence the written statement itself, signed by the plaintiff, stating the time, place, manner, and cause of his being injured and the nature and extent of his injuries. Held, that the taking of the written statement constituted a waiver by the company of the failure to give the notice.

Porter, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Brown County; William I. Stuart, Judge.

Action by D. P. Smith against the Chicago, Rock Island &

*For the authorities in this series on the subject of the right of a railroad employee, to assume that his master has performed, or will perform, its duties to him, see first foot-note of McConnell *v.* Pennsylvania R. Co. (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; fourth foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

†See second foot-note of Silvia *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. A. Low and *Paul E. Walker,* for appellant.
Waters & Waters, and *John F. Kerrigan,* for appellee.

PORTER, J. On the evening of June 7, 1907, D. P. Smith, an engineer in the employ of the defendant, was running an engine with a freight train from Horton to Topeka. When about five miles from Horton, at the foot of a long, steep grade, and at a tangent of a curve, the engine was derailed, and the plaintiff received injuries to recover damages for which he brought this action. The jury returned a verdict in his favor for $2,000, and the defendant appeals.

The engine which the plaintiff was running belonged to the 1,600 type class, very large and heavy. The track where the accident occurred had been constructed for 20 years and was of 60-pound rails, somewhat worn. On account of the lightness of the rails, a rule of the company limited the speed of engines of this type to 15 miles an hour. The petition alleged that the derailment was caused by defective ties and rails. Among other defenses, the answer set up that the plaintiff was guilty of contributory negligence in running his engine at a high rate of speed in excess of 15 miles an hour. The plaintiff testified that he was familiar with the rule limiting the speed, and was running 15 miles an hour. The witnesses for the defendant placed various estimates on the speed of the train from 20 to 40 miles an hour. The derailment and overturning of the engine, and the fact that 20 of the freight cars were piled in confusion on the right of way, tended strongly to discredit the engineer's testimony, but we cannot say as a matter of law that it was physically impossible for this to have resulted with the train running at a speed of 15 miles. The speed of the train was under all the evidence a question for the jury, and as to this fact their verdict must stand. The jury made a special finding that the negligence of the defendant consisted in having defective ties and rails. Some of the defendant's own witnesses testified that the inside ball of the rail was worn, and that a rail in that condition on a curve is unsafe. Witnesses for the plaintiff testified that there were at least six rotten and defective ties at the place where the derailment occurred. There was therefore some evidence to sustain a finding of the jury to the effect that the derailment was caused by defective ties and rails, and that these defects had existed for such a length of time that the defendant was bound to have notice of them. If the jury believed the plaintiff's testimony that he did not know the condition of the ties and rails, it disposes of the defense of assumed risk. Railway Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938; Railway Co. *v.* Bancord, 66 Kan. 81, 71 Pac. 253; Brinkmeier

v. Railway Co., 69 Kan. 738, 77 Pac. 586. There are doubtless cases the extreme logic of which would seem to justify holding that an engineer has equal opportunities with the railway company to know every defect existing in the ties and rails in the track over which he runs his engine, but in our judgment so to hold is contrary to the weight of reason. The more recent tendency of the courts is against any extension of the doctrine of assumed risk. The present case is obviously different from one where an employee constantly engaged in work in and about a railroad yard is injured by a defect in the tracks the condition of which he is required to know. Thus in Clark *v.* Mo. Pac. Ry. Co., 48 Kan. 654, 29 Pac. 1138, a brakeman was held to have assumed the risk as to the condition of the roadbed where he had equal knowledge with the master of the defects which caused his injury. To the same effect is Railway Co. *v.* Click, 78 Kan. 419, 96 Pac. 796. On the other hand, in St. L., Ft. S. & W. Rd. Co. *v.* Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266, it was held that the conductor of a train is not required to know all the defects and obstructions that may exist on the road over which he runs. What reason can be suggested why the same rule should not apply to an engineer? It is true that the duties of a conductor require him to remain on the inside of the train while the duties of an engineer oblige him to keep his eyes on the track; but the engineer's lookout is always ahead to see if the track is clear, and he is not required to examine the condition of the ties and rails. It is sufficient for him to know that they are in place, and, if they are, he has the right to assume that the company has discharged its obligations to keep them in reasonably safe repair.

When the plaintiff entered the employ of the railway company, he executed a written agreement which provided that, if he sustained any personal injury while in the service of the company for which he might make claim for damages, he would within 30 days thereafter give notice in writing to the general or claims attorney, stating the time, place, manner, cause, and extent of his injuries and his claim therefor, and that his failure to give such notice should constitute a bar to any suit on account of such injuries. The contract of employment was introduced in evidence by the defendant and there was no showing by the plaintiff that he gave any notice of the injury. At the close of the evidence, the defendant requested the court to instruct the jury that if they found from the evidence that the plaintiff voluntarily signed the contract and did not give the notice provided therein, and that the railway company had not waived the giving of such notice, their verdict should be for the defendant. The court refused to give this instruction, but gave one in which the jury were told that the contract was not binding on the plaintiff, and the fact that he did not comply with

the agreement and give such notice constituted no defense to the action. In our view, this raises the only question in the case. Conceding that the provision requiring notice of the claim was a reasonable and lawful one, that plaintiff was bound thereby, and that the instruction given by the court was erroneous, the error must be regarded as wholly immaterial for the reason that on the trial defendant introduced evidence showing a waiver by the company of this provision of the contract. Plaintiff himself testified without objection that some one from the claim department of the company came to his house three weeks after the injury, and took from him a written statement about the wreck. Defendant then introduced in evidence the written statement itself which states the time, place, manner, and cause of his being injured, and the nature and extent of his injuries. It is signed by the plaintiff. The only detail in which it fails to comply with the provisions of the contract as to notice is in not stating the amount of his claim for injuries; but manifestly this omission would not be sufficient to deprive him of his right to maintain the action. Being in the nature of a forfeiture, the provision must be strictly construed. A similar provision in the contract was involved in Railway Co. *v.* Walker, 79 Kan. 31, 99 Pac. 269. The question there arose upon the pleadings, but it was held that the provision may be waived, that no consideration is necessary to support a waiver, and that it is not necessary to show facts amounting to technical estoppel in order to constitute waiver of such a provision. Whether the written statement which the defendant obtained from the plaintiff be regarded as a sufficient compliance with the condition requiring notice to be given, or the action of the defendant in taking the statement be considered as a sufficient excuse for the failure of the plaintiff to give the notice, is not important. It is well established that the courts will not enforce a forfeiture where the conduct of the other party is sufficient upon which to base a reasonable excuse for the default. Hartford Life Ins. Co. *v.* Unsell, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496. At the top of the statement made to the claim agent there is a pencil memorandum as follows: "Horton, July 24-07" —indicating that the statement was made on that date which was more than 30 days from the date the injuries were received. The plaintiff, however, testified that he made and that the agent took the statement within three weeks after the accident. The majority of the court is of the opinion that, since the defendant offered no evidence to the contrary further than what appeared by the memorandum referred to, there was no question of fact in regard to waiver that should have been submitted to the jury.

The judgment will therefore be affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, GRAVES, and BENSON, JJ., concurring.

PITTSBURG, C., C. & ST. L. RY. CO. *et al. v.* SCHAUB.

(Court of Appeals of Kentucky, Feb. 11, 1910.)

[124 S. W. Rep. 885.]

Master and Servant—Safe Place to Work—Danger of Injury—Judgment of Foreman—Right to Rely Thereon.*—Employees have a right to rely on the judgment of their foreman as to the danger of injury in work he orders them to do, unless so manifestly dangerous that a person of ordinary prudence would not undertake it.

Master and Servant—Safe Place to Work—Precautions for Safety—Right to Presume.†—Two employees, acting under the immediate orders of their foreman, went under a loaded car on a private switch track connected with the plant to stop a hole in the floor through which grain was leaking; the foreman having gone to the office. It was unusual for the railroad company to put cars in on the switch till notified so to do, but without such notice a railroad crew pushed two other cars on the switch track without notice to such employees, and one whose back was towards the approaching cars was injured before he could get out. Held, that the employees had a right to presume the foreman had taken, or would take, sufficient precautions for their safety.

Master and Servant—Safe Place to Work—Assumption of Risk—Precautions for Safety—Questions of Law.—The situation was not so manifestly dangerous that it could be said, as a matter of law, either that a person of ordinary prudence would not have undertaken the work, or that some precautions should not have been taken for their safety.

Negligence—Pleading.‡—Negligence may be alleged generally, and the facts constituting it need not be set out, as this matter is evidential.

Railroads—Persons Working about Cars—Action for Injuries—Pleading Negligence.—When, in a suit against a railway company for injury to a person at work under a box car on a private switch track when other cars were pushed thereon, plaintiff alleged defend-

*See generally, extensive note, 12 R. R. R. 377, 35 Am. & Eng. R. Cas., N. S., 377; last foot-note of St. Louis, etc., R. Co. *v.* Morris (Kan.), 28 R. R. R. 356, 51 Am. & Eng. R. Cas., N. S., 356; last foot-note of McDonnell *v.* New York, etc., R. R. (Mass.), 25 R. R. R. 525, 48 Am. & Eng. R. Cas., N. S., 525.

†For the authorities in this series on the subject of the right of a railroad employee to assume that his master has performed or will perform its duties to him, see first foot-note of McConnell *v.* Pennsylvania R. Co. (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; fourth foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

‡For the authorities in this series on the subject of pleading negligence, see fourth foot-note of Hoskins *v.* Northern Pac. Ry. Co. (Mont.), 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174.

ant knew, or by ordinary care could have known, he was under the car, and with this knowledge by gross negligence backed the car on him, he sufficiently stated his case for negligence against it, and he may show the circumstances making out its negligence, without setting them out in the pleading.

Railroads—Persons Working about Cars—Precautions to Avoid Injury.—A railroad crew must anticipate the presence of persons about a car on a private siding, not ready to be moved, in charge of the shipper, and should not bump against it without notice.

Master and Servant—Suit for Injuries—Pleading—Concurring Negligence—Safe Place to Work.—In a suit against a manufacturing company for injury to an employee, plaintiff alleged that he was instructed by defendant to go under a car on a switch track to do certain work thereon, and that in obedience to orders he located himself thereunder, and proceeded to repair the same as directed; that defendant with gross negligence failed to provide reasonably sufficient warning or protection, and, notwithstanding its knowledge of his peril, negligently allowed an engine to bump into the car; that the premises were at the time and place under the joint control of defendant and its codefendant railway company, and that each of them participated in the negligent acts set out, and with joint and gross negligence inflicted, and caused to be inflicted, on plaintiff his injuries complained of. Held, that the facts alleged showed a cause of action against the employer.

Master and Servant—Action for Injuries—Instructions—Safe Place to Work.—The facts so alleged warranted an instruction that it was its duty to exercise ordinary care to furnish plaintiff a reasonably safe place to work, and to keep it safe, and that when it directed him to go under the car to work, it was its duty to exercise ordinary care to protect him from injury by a movement of any car on the siding while he was so engaged; and, if it failed to do so, and by reason thereof he was hurt, the jury should find in his favor.

Master and Servant—Suit for Injuries—Instructions—Contributory Negligence.—An employee was injured by the bumping of a car against another under which he was at work with a co-employee on a private siding belonging to his employer. In a suit therefor, he and his co-employee were the only persons testifying as to notice of the danger. Plaintiff said that the notice and bump came practically at the same time. His co-employee's evidence was so uncertain as not to contradict him as to whether he could by ordinary care have avoided danger after his co-employee gave him warning. There was no other evidence of his want of care. The court instructed that it was his duty to use ordinary care for his own safety, and that, if he failed to do so, and but for such failure would not have been injured, the jury should find for defendants, his employer and the railway company. Held, that defendants were not substantially prejudiced by the form of the instruction; that, while it would not have been improper to have instructed them that, if he was no-

tified of the danger, and after such notice failed to exercise ordinary care for his own safety, and but for this would not have been injured, the jury should find for defendants, the instruction given carried with it this idea.

Appeal and Error—Review—Conflicting Evidence—Amount of Damages for Personal Injury.—A finding on conflicting evidence as to the amount of damages in a personal injury case will not be disturbed on appeal, where it cannot be said on the whole case that the verdict is palpably against the evidence.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Suit by John Schaub against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and another, for personal injury. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. H. Gibson, Bennett H. Young, M. A. Ripy, and *E. C. Waide,* for appellants.

Popham & Webster and *Kohn, Baird, Sloss & Kohn,* for appellee.

HOBSON, J. The Kentucky Malt & Grain Company operates a plant at Thirteenth and Maple streets in Louisville, and owns in connection with its plant a railway switch track connecting with the tracks of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. This switch track is short, holding only about four cars. John Schaub was an employee of the grain company, and on March 10, 1908, was directed by his foreman to go under a car standing on the switch track with a fellow workman named Linert, to stop a hole which had been discovered in the floor of the car through which the grain was leaking. The car had been placed on the switch the day before to be loaded, and after it was loaded this leak was discovered, and it was necessary to stop the leak before the car was sent out on the road. While Schaub and Linert were under the car engaged in this work, the foreman of the grain company, who had put them to work there, went to the office to make out a waybill for the car, and while he was gone to the office, a crew on the railroad pushed in two other cars on the switch track without notice to Schaub and Linert. These cars ran against the cars on the track, and pushed the car that they were working under so that the axle struck Schaub a blow on the arm. Linert, who was looking in that direction, perceived the danger in time to get out, and he called to Schaub, who was further under the car and had his back turned to the approaching cars, but Schaub did not get the notice in time to avoid the injury. Schaub brought this suit against both companies to recover damages;

a trial was had which resulted in a verdict and judgment against each for $1,000, and they appeal.

The court by its instructions told the jury in substance that it was the duty of the grain company to exercise ordinary care to furnish Schaub a reasonably safe place to work, and to exercise ordinary care to keep it safe, and that when it directed him to go under the car to work, it was its duty to exercise ordinary care for his protection from injury by a movement of any car on the siding while he was so engaged; and, if it failed to do this, and by reason of such failure he was hurt, they should find for him as to it. He also told the jury that it was the duty of the railroad company, in moving the cars on the siding of the grain company, to exercise ordinary care for the safety of its employees, and to that end to give the usual signals of the movement of any engine on the siding by ringing the bell; and, if the crew in charge of the engine knew, or by the exercise of ordinary care could have known, that the plaintiff was under the car at the time they moved the engine, or if they failed to give the usual signals of the movement of the engine, and thus backed against the car and injured him while at work under it, they should find for him against it. He further instructed the jury that it was the duty of Schaub to use ordinary care for his own safety, and that if he failed to do this, and but for such failure would not have been injured, they should find for the defendants.

The grain company insists that it is not liable; for Schaub knew, as is shown by the evidence, that nobody was on the lookout, and that therefore he took the risk, as between him and it, when he remained under the car at work after the superintendent went away to the office to make out the waybill. Schaub and Linert were acting under the immediate orders of their superior, and they had a right to rely upon his judgment, unless the work was so manifestly dangerous that a person of ordinary prudence would not have undertaken it. They had a right to presume that he had taken, or would take, sufficient precautions for their safety, as he could have done by giving the railway company notice of what was going on, or otherwise protecting them. It was not usual for the railway company to put cars in on this switch until notified by the grain company. It was the private switch of the grain company, and the situation was not so manifestly dangerous that it can be said, as a matter of law, that a person of ordinary prudence would not have undertaken the work. Nor can it be said, as a matter of law, that some precautions should not have been taken to secure these men in their perilous position under the car.

As to the railway company, it is insisted that the instructions of the court submitted to the jury a matter which was not put in issue by the petition. It is said that the plaintiff had set out

the negligence on which he relied, and that the court by its instructions submitted to the jury the question whether there was negligence in moving the engine in on the siding without any signals, when this was not alleged. This is too narrow a construction of the pleading. The original petition, among other things, contains the following: "He states that defendants, and each of them, well knew that it was customary for persons to, and they frequently did, crawl under said cars, for the purpose of making repairs and other purposes incident to the facilitation of said business, and well knew that a person thereunder was in great peril and danger to his life and limb unless great care was by them exercised for his protection. He states that notwithstanding said custom, instructions, peril, and danger, the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company did then and there, with gross negligence and carelessness, run and cause to be run a certain switch engine in on said track and violently onto and against said car, putting the same in motion, thereby inflicting upon plaintiff the injuries hereinafter set out." The court sustained the demurrer of the railway company to the petition, and he then filed an amended petition, in which he made this further averment: "That at the time and place he was injured said defendant knew, or could by the exercise of ordinary care have known, of his peril under his box car where he was working."

This court has held in a long line of cases that negligence may be alleged generally, and that the facts constituting the negligence need not be set out, as this matter is evidential. When the plaintiff alleged that the defendant knew, or by ordinary care could have known, that he was under the car, and with this knowledge by gross negligence backed the car upon him, he sufficiently stated his case under the rulings of this court, and he may show the circumstances making out the negligence of the defendant without setting them out in his pleading, for the reason that the want of ordinary care is often a matter depending upon a number of facts, and to set them all out in the pleading would be unnecessarily to incumber it. In Chiles *v.* Drake, 2 Metc. 149, 74 Am. Dec. 406, the court thus stated the rule: "In actions for personal injuries resulting from negligence, it has always been regarded as sufficient for the plaintiff to allege in general terms that the injury complained of was occasioned by the carelessness and negligence of the defendant. He has not been required to state the circumstances with which the infliction of the injury was accompanied, in order to show that it had been occasioned by negligence. An allegation of the extent of the injury and of the manner in which it was inflicted has been always regarded as sufficient. * * * The injury complained of was the killing of the plaintiff's intestate. The manner of its infliction was by shooting. The shooting and

killing were occasioned, as alleged, by the 'willful neglect' of the defendant. These facts were all set forth in the petition, and nothing more was necessary." In Louisville, C. & L. R. R. Co. *v.* Case, 9 Bush, 732, the court, following the above, said: "The averment of the essential facts—viz., the death of the intestate—that his life was destroyed by the act of the railroad company in running its cars over him, and the carelessness and negligence through or by which this was done, made out for appellee a cause of action, under the first section of the act of 1854." The same rule has been followed in personal injury cases where death did not result. L. & N. R. R. Co. *v.* Wolfe, 80 Ky. 84; Ky. Central R. R. Co. *v.* McMurtry, 3 Ky. Law Rep. 625; Depp *v.* L. & N. R. R. Co., 14 S. W. 363, 12 Ky. Law Rep. 367; Connell *v.* C. & O. R. R. Co., 58 S. W. 374, 22 Ky. Law Rep. 501. This car had been set on the side track to be loaded. The preparation of the car for delivery to the railway company had not been completed; it was not ready to be moved, and was still in charge of the grain company. The railway crew were required to anticipate the presence of persons about that car, and should not have bumped against it without notice. In the recent case of Louisville & Nashville R. R. Co. *v.* Hurst, 116 S. W. 291, we said: "The rule is well settled that where the railroad company places a freight car upon a side track for the purpose of its being unloaded by the owners of the freight or their servants, the servants are rightly upon the car, and the railroad company has no right in such a case to back other cars against it without warning, so as to injure them."

For the reason we have given the petition is not insufficient as to the grain company. Among other things it contained as to it these allegations: "He states that on or about March 10, 1908, the plaintiff was in the employ of defendant Kentucky Malt & Grain Company at and upon said premises, and as such employee was instructed by defendant, its superior officers and agents over plaintiff, to get under a certain car upon said switch track at and near said scales, as aforesaid, and to do certain work thereunder for the prevention of grain leakage; that in obedience to said orders plaintiff located himself under said car, and proceeded to repair the same as directed. * * * He states that defendant Kentucky Malt & Grain Company did then and there with gross negligence and carelessness fail to provide suitable or reasonably sufficient warning or protection to plaintiff, and notwithstanding its knowledge of his peril and danger negligently allowed said engine to bump into and violently knock said car. He states that said premises were at said time and place under the joint control of defendants, and that they and each of them participated and concurred in the wrongful and negligent acts hereinbefore set out, and with

joint gross negligence inflicted, and caused to be inflicted, upon plaintiff his injuries herein complained of."

The facts thus alleged showed a cause of action against the grain company, and fully warranted the instruction given by the court. There was no substantial prejudice done the defendants by the form of the instruction on contributory negligence. While it might not have been improper to have given an instruction to the effect that if Schaub was notified of the danger, and after such notice failed to exercise ordinary care for his own safety, and but for this would not have been injured, the jury should find for the defendants, the instruction which the court gave carried with it this idea, and if the instruction in the other form had been given, we are satisfied it would have had no effect on the result, for the reason that Schaub and Linert are the only witnesses testifying on the subject. Schaub says the notice of the danger and the bump of the car came practically at the same time, and Linert's evidence is so uncertain as not to amount to a contradiction of Schaub as to whether Schaub could by ordinary care have avoided the danger after Linert gave him warning. There was no other evidence of want of care on the part of Schaub, and it is not to be readily believed that a man in Schaub's position would quietly stay under the car when he had notice that an engine was backing down against it.

As to the extent of the injury three doctors testified; the arm was exhibited to the jury, and was examined by the doctors in their presence. If the evidence of Schaub and his doctor alone were taken, he has not recovered nearly enough. If the evidence for the defendant alone is taken, he has recovered far too much. But the jury had the witnesses before them, and we cannot say on the whole case that their verdict is palpably against the evidence.

Judgment affirmed.

PENNSYLVANIA R. CO. *v.* KELLY.

(Circuit Court of Appeals, Second Circuit, March 7, 1910.)

[177 Fed. Rep. 189.]

Master and Servant—Misconduct of Servant—Injuries to Third Persons—Special Police Officer.—The New York City charter authorizes the police commissioner to appoint special patrolmen for special duty at any place in the city, the applicant paying for such services in advance, and declares that such special patrolmen shall be subject to the orders of the chief of police, shall obey the rules and regulations of the police department of the city, and conform to the general discipline and such special regulations as shall be made, and shall possess all the powers and discharge all the duties of the police force applicable to regular patrolmen. Held that, where a special policeman was assigned to duty on defendant's pier to regulate traffic, and committed an unprovoked and unjustifiable assault on plaintiff in a public street leading to the pier, the fact that defendant paid the patrolman's wages for keeping order on its premises did not render it liable for the assault.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by John Kelly against the Pennsylvania Railroad Company. Judgment for plaintiff on a verdict in his favor of $730.50, and defendant brings error. Reversed.

Robinson, Bibble & Benedict (*Norman B. Beecher,* of counsel), for plaintiff in error.

House, Grossman & Vorhaus (*Louis J. Vorhaus* and *Charles Goldzier,* of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. On the morning of November 9, 1906, the plaintiff, who was a truckman and piano mover, started with a two horse team and two helpers to the pier of the defendant at the foot of West Thirty-Seventh street, New York, to receive and move a Tiffany grand piano. When the plaintiff, who was driving, reached the foot of the street Michael Gunn, a policeman of the city of New York assigned to special duty on the defendant's pier and paid by the defendant, raised his hand as a warning signal to the plaintiff to halt. This he did not do immediately and an altercation arose which culminated in his receiving a severe blow from the policeman's club which caused the injuries complained of.

The version of the occurrence given by Gunn is to the effect that the plaintiff was contumacious and insulting and that the

blow was struck to prevent an assault by the plaintiff and his companions. It is, of course, unnecessary for us to consider the question of fact thus presented. The basic question is, should the court have submitted the facts to the jury, and, in such circumstances, the plaintiff is entitled to the most favorable view of the testimony.

The complaint alleges that on the day in question, "The defendant had in its employ as a special officer, one Michael Gunn, whose duty it was as such special officer, to regulate the traffic on the defendant's pier at the foot of West Thirty-Seventh street." This appointment was made pursuant to the provisions of the city's charter which provides, in substance, that, when the necessity therefor is shown, the police commissioner may appoint and swear in any number of special patrolmen to do special duty at any place in the city, the applicant paying for such services in advance. Such special patrolmen shall be subject to the orders of the chief of police, shall obey the rules and regulations of the police department of the city and conform to the general discipline and such special regulations as may be made. They shall "possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen."

In short, for the purposes of this controversy, it may be stated that Gunn possessed all the powers of a regular patrolman. His salary was, it is true, paid by the defendant for special services upon its pier but any act which a regular officer could do lawfully, Gunn could do. The converse of this proposition is also true. An act unlawful for the regular was unlawful for him, he had no immunity not possessed by the ordinary officer.

The question, then, for us to determine may be stated as follows: Is a corporation which pays for the services of a policeman to guard his property and preserve order upon its premises liable for an unprovoked and wholly unjustifiable assault committed by him upon a public street? We are constrained to answer this question in the negative.

The witnesses all agree as to location of the assault. It was not on the pier but at the foot of West Thirty-Seventh street at least 50 feet from the entrance to the pier. We may take judicial notice of the fact that West Thirty-Seventh street is a public highway in no way under private control and that it is the duty of police officers to control the movement of teams and regulate traffic at the point in question. The testimony of the plaintiff indicates that he was doing nothing unlawful or unusual at the time in question. He says he was proceeding towards the pier when he received the signal to stop. He immediately reined in his team but because he did not stop soon enough Gunn drew his club, jumped upon the wagon and dealt him a blow which rendered him unconscious.

To hold the person who pays a policeman's wages for keeping order upon his premises liable for such a malicious assault as this, committed upon a public highway, goes far beyond the doctrine of any well considered case with which we are familiar. If the plaintiff tells the truth there was no justification for the brutal assault made upon him but the defendant has done no act of omission or commission which renders it liable therefor.

The judgment is reversed with costs.

ALABAMA & V. RY. CO. *v.* BALDWIN.

(Supreme Court of Mississippi, May 23, 1910.)

[52 So. Rep. 358.]

Trial—Instructions—Applicability to Case.—There is no error in refusing an instruction which is not applicable to the facts of the case.

Evidence—Judicial Notice—Matters of Common Knowledge.*—That it is the duty of a railroad section master to supervise the right of way and keep it in proper condition, so that fires would not extend from it to the property of others, and to extinguish such fires when set out, is a matter of common knowledge, of which the court will take judicial notice.

Master and Servant—Liability to Third Persons—Scope of Authority.—Where it was the duty of a section master to supervise the right of way and keep it in proper condition, so that fires would not extend from it to the property of others, and to extinguish such fires when set out, the act of such section master and his section hands in setting out a fire was one within the scope of their authority, for which the railroad company was liable.

Railroads—Operation—Fires—Proximate Cause of Injury.—In an action for damages caused by a fire set out on a railroad right of way by a section master and section hands, evidence held sufficient to go to the jury on the question whether the negligence of the crew in setting out the fire or the sudden springing up of the wind was the proximate cause of the injury.

Damages—Fires.—In an action against a railroad company for the destruction of orchard trees by fire starting from the railroad right of way, where the testimony shows that the trees were worth

*For the authorities in this series on the subject of judicial notice of things pertaining to railroads, see first foot-note of Bergan *v.* Central Vt. Ry. Co. (Conn.), 34 R. R. R. 426, 57 Am. & Eng. R. Cas., N. S., 426; fifth head-note of Hoskins *v.* Northern Pac. Ry. Co. (Mont.), 34 R. R. R. 174, 57 Am. & Eng. R. Cas., N. S., 174; seventh head-note of Brian *v.* Oregon Short Line R. Co. (Mont.), 34 R. R. R. 18, 57 Am. & Eng. R. Cas., N. S., 18.

from $1 to $4 apiece, an award of about $1.50 per tree was not excessive.

Appeal from Circuit Court, Hinds County; W. H. Potter, Judge.

Action by E. E. Baldwin against the Alabama & Vicksburg Railway Company. The cause was revived in the name of C. F. Baldwin, as executor. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee's intestate, E. E. Baldwin, sued the appellant, the Alabama & Vicksburg Railway Company, for $732 damage claimed to have been done him by the appellant in the destruction of his peach orchard of 336 trees by fire set out by the employees of the appellant. The plaintiff died after suit was brought, and the cause was revived in the name of his executor, C. F. Baldwin. There was a trial, and verdict and judgment for $594 and costs, from which this appeal is prosecuted.

It is insisted that the case ought to be reversed on three grounds, viz.: That the court erred in not granting the peremptory instruction asked on behalf of the defendant; that the verdict is excessive; and in refusing instruction No. 1. for the defendant, as follows: "If the jury believe from the evidence that the defendant's section hands, for the purpose of warming or cooking their food, set out the fire which, by spreading, caused the injury to plaintiff complained of, and that as soon as it was discovered that the fire had spread to plaintiff's property they made all proper effort to extinguish the same, they will find for the defendant."

The testimony for the plaintiff tended to establish the following facts: His home was near the railroad. His peach orchard and tenant houses were located near by on the south side of the railroad. The fire occurred in January, 1908, which destroyed his orchard. On that day a section crew, in the employ of the defendant company, were at work on the road near plaintiff's premises. This section crew set fire to a pile of old cross-ties on the right of way on the south side of the railroad. About noon, when they ate their dinner, these cross-ties were burning. There is some testimony to show that there was still another fire, which the section crew built to warm their dinners by. After eating dinner they went to work at a point not far distant from where this fire was, which was left burning. The right of way of the railroad at this point was foul with weeds and grass, not having been cleared or burned off for a year or more. Shortly after the section crew returned to their work, a fire was discovered burning from the direction of the railroad, where the burning cross-ties were left, toward the orchard. It had made considerable progress, it seems, when discovered.

Parker, the section foreman, took his hands, and with the help of Baldwin succeeded in extinguishing the fire before it reached the tenant houses, but after it had burned through the orchard and destroyed the trees. While they were fighting the fire, Parker stated to Baldwin that the fire got out from the burning cross-ties; that it sprung up so suddenly he could not stop it. One of the section hands stated to a witness, about the same time, that the fire got out from one made at noon by the section crew to warm their dinner. There were 336 peach trees entirely destroyed. The testimony showed they were worth from $1 to $4 apiece.

The railroad company undertook to show by its witnesses that the section crew set out no fire; that they neither set fire to cross-ties, nor built a fire to warm their dinners by; that the right of way had been burned off a few months before, and was clear of weeds and grass. Several of the section hands testified to these facts.

McWillie & Thompson, for appellant.
Wells & Wells, for appellee.

ANDERSON, J. (after stating the facts as above). There was no error in refusing instruction No. 1 for the defendant, because not applicable to the facts of this case. This instruction was asked on the authority of Morier *v.* Railway Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793. In that case the court held that the railroad company was not responsible for the fire which destroyed the property of the plaintiff, set out by the section hands for the purpose of warming their food, because in so doing they were not engaged about the master's business. They were acting without the scope of their authority, and pursuing their own private ends. In that case the court used this language: "Nor is there any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be set out on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track." The instant case is clearly distinguishable from that. Here it was the duty of the section master to supervise the right of way, keep it in proper condition so that fires would not extend from it to the property of others, and extinguish such fires when set out. The record in this case sufficiently shows such to be among his duties; and, if it did not, it is a matter of common knowledge, of which the court will take judicial notice. In Railroad Co. *v.* Stinson, 74 Miss. 453, 21 South. 14, 522, the court held: "And as to the scope of that agency [referring to the section master] we will employ that common knowledge possessed by mankind generally in ascertaining whether it was his duty to look after and clear off the company's right of way. We take knowledge

of the fact that it was his duty to keep the track and right of way in proper condition." So that, in setting out the fire and in failing to extinguish it, even though it was done for their own private purposes, the section foreman and hands were acting within the scope of their authority. They were engaged about the business of their master. They were required not to do the very thing they did do, if dangerous to the property of others.

There was no error in refusing the peremptory instruction. It is contended that no negligence was shown; that the act of the section crew in setting out fire was shown not to have been the proximate cause of its spreading to plaintiff's orchard; but the sudden springing up of the wind was shown to have been the intervening efficient cause, and, therefore, the court should have directed the jury to find for the defendant. In view of the condition of the right of way at this point, taken in connection with the other facts and circumstances shown, there was sufficient evidence to go to the jury on this question.

It cannot be said that the verdict was excessive. The jury allowed the plaintiff about $1.50 per tree. The testimony shows that they were worth from $1 to $4 apiece.

Affirmed.

MASSY *v.* MILWAUKEE ELECTRIC RY. & LIGHT CO.

(Supreme Court of Wisconsin, May 24, 1910.)

[126 N. W. Rep. 544.]

Master and Servant—Safety of Place to Work and Appliances—Duty of Master.*—An employer must provide a reasonably safe place to work and reasonably safe appliances to work with, and he is liable for the proximate consequences to the servant from omission so to do.

Master and Servant—Assumption of Risk—Knowledge.†—An em

*For the authorities in this series on the subject of the degree of care required of a railroad, as an employer, in furnishing and maintaining a safe place to work, see second foot-note of McConnell *v.* Pennsylvania R. Co. (Pa.), 34 R. R. R. 84, 57 Am. & Eng. R. Cas., N. S., 84; first foot-note of St. Louis S. W. Ry. Co. *v.* Lewis (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; second foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

For the authorities in this series on the subject of the degree of care required of an employer to furnish safe appliances, see first foot-note of St. Louis S. W. Ry. Co. *v.* Lewis (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; foot-note of Hill *v.* Atchison, etc., Ry. Co. (Kan.), 34 R. R. R. 672, 57 Am. & Eng. R. Cas., N. S., 672.

†See last foot-note of Vaillancourt *v.* Grand Trunk Ry. Co. (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353.

ployee assumes the ordinary risks of the business which he knows, or, as an ordinary careful and intelligent man, ought to anticipate.

Master and Servant—Risks Assumed by Servant—Infirmity of Fellow Workmen.—The likelihood of human infirmity in his fellow workmen is one of the risks assumed by an employee.

Master and Servant—Negligence of Fellow Servant—Liability Therefor.‡—A master is not liable for negligence of a fellow servant in the common employment.

Master and Servant—"Vice Principal"—"Fellow Servant."§—A distinct and independent employee to whom is delegated the duty to disconnect and make safe electric wires on which others must work is ordinarily a vice principal, and not a fellow servant with the linemen and other like workmen.

Master and Servant—Action for Death of Employee—Question for Jury.—In an action for death of an employee, evidence held to present a question for the jury whether another employee was a fellow servant with decedent, and also whether the place or appliances furnished decedent were rendered not reasonably safe by failure to discharge the master's duty entrusted to the other employee.

Appeal from Circuit Court, Milwaukee County; Lawrence W. Halsey, Judge.

Action by Minnie Massy, administratrix of Hugh Massy, deceased, against the Milwaukee Electric Railway & Light Company for the death of plaintiff's intestate. Plaintiff was nonsuited, and she appeals. Reversed.

On May 13, 1907, plaintiff's decedent, then 20 years of age, had been employed for a month as lineman's helper by the defendant, his work consisting in the handling of apparatus and materials to facilitate the lineman; deceased working on the ground and the lineman both on the ground and on the poles. Deceased had never handled live wires. On that date decedent's lineman and some other employees went to west Allis to readjust the wires and change brackets in a certain region. The wires included a "feed wire" ordinarily carrying electricity to the dangerous extent of 2,300 volts. Deceased and his lineman went to a substation, where was an operator who controlled the switchboard connecting and disconnecting wires. They found there the assistant superintendent of the lighting department,

‡See second paragraph of first foot-note of Still *v.* San Francisco & N. W. Ry. Co. (Cal.), 31 R. R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680; fourth foot-note of Indianapolis, etc., Co. *v.* Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

§For the illustrations in this series showing who are vice-principals or superior servants, see second paragraph of first foot-note of Chicago, etc., Ry. Co. *v.* Barker (Ind.), 28 R. R. R. 228, 51 Am. & Eng. R. Cas., N. S., 228; first foot-note of Chicago, etc., Ry. Co. *v.* Rathneau (Ill.), 26 R. R. R. 202, 49 Am. & Eng. R. Cas., N. S., 202.

and requested that the feed wire might be killed during their operations; that is, disconnected from the current. They were informed that it was already dead, and in their presence the assistant superintendent directed the operator of the switchboard, Waldmann, not to turn electric current into that feed wire until he received direct word from the decedent's lineman. It appeared that a certain other employee, Dietz, having certain repairs or adjustments to make in the substation, had previously, the same day, requested Waldmann to disconnect this feed wire; that Dietz finished his job at about half past 1 of the same day, and notified Waldmann of that fact, remarking, "You can call up Commerce street, and tell him to put the current on the line again." Waldmann did so, and switched into connection said feed wire, momentarily forgetting the instruction to keep the wire dead for the protection of the line crew of which deceased was one. Deceased at that moment, two or three blocks away, had hold of the wire with his bare hands, and was instantly killed. At the close of the plaintiff's evidence a judgment of nonsuit was entered, from which the plaintiff appeals.

Samuel Wright and *Houghton, Neelen & Houghton,* for appellant.

Clarke M. Roscrantz, for respondent.

DODGE, J. (after stating the facts as above). This case presents a situation not unfamiliar, but of rather recent development since the greatly enlarged use of electricity transmitted over wires for the creation of light and power at various and remote places. There, as we know, men are constantly employed in stringing, connecting, repairing, and rearranging such wires, sometimes on one post and sometimes on another. When the wires on or about which such men must work are highly charged with electricity, they endanger the men. The place of work becomes in some degree unsafe. On whom rests the risk from such danger if it is unreasonable? There are two well-established rules of the common law which in the early stages of industry were quite distinct and unlikely to conflict. We have, first, the rule that the employer owes the duty to provide a reasonably safe place to work and reasonably safe appliances to work with, and is liable for the proximate consequences to the servant from omission so to do. On the other hand, we have the rule that the employee assumes the ordinary risks of the business which he knows, or, as an ordinary careful and intelligent man, ought to anticipate; among those risks is the likelihood of human infirmity in his fellow workmen, so that they may be careless. Hence the concrete rule that a master is not liable to his servant for negligence of a fellow servant in the common employment. As the size of industrial enterprises in-

creased, complications arose. The master did not by his own hand build or equip the place for his employees, nor even personally supervise the doing of such things, but hired men to do them, especially so in case of corporations, which can act only through some employee or delegate. The question at once presented itself, are persons so employed to perform the master's duty toward other employees fellow servants of the latter within the rule above stated? and, broadly stated, the answer of the courts has been negative, but the line of distinction has been most difficult of definement, and has been crowded to one side or the other of individual situations by different courts, and sometimes by the same court without very clear coherence of reason. The layers of the track over which the trainmen are to run have been held to be fellow servants in the common enterprise of operating the railway, instead of representatives of the master in performing the latter's duty to provide a safe track for the trainmen to perform the particular work of running their train. Cooper *v.* Railway, 23 Wis. 668. The same view is held as to a switchman who fails to keep turned a switch, and thereby allows a train to run upon a car repairer at work on the switch. Smith *v.* Railway Co., 91 Wis. 503, 65 N. W. 183. Other situations located upon the same side of the line are Okonski *v.* Fuel Co., 114 Wis. 448, 90 N. W. 429; Williams *v.* Northern Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589; Miller *v.* Centralia Pulp & Water Power Co., 134 Wis. 316, 113 N. W. 954, 13 L. R. A. (N. S.) 742. Some cases presenting the antithetic condition where the negligent employee was held not to be a fellow servant engaged in common undertaking, but the representative of the master in performing or failing to perform the latter's duty to the plaintiff, are Cadden *v.* American Steel Barge Co., 88 Wis. 409, 60 N. W. 800; Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 80, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859; McMahon *v.* Ida Mining Co., 95 Wis. 308, 70 N. W. 478, 60 Am. St. Rep. 117; Jarnek *v.* Manitowoc Coal & Dock Co., 97 Wis. 537, 73 N. W. 62; Zentner *v.* Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911; Smith *v.* Milwaukee E. Ry. & L. Co., 127 Wis. 253, 106 N. W. 829; Rankel *v.* Buckstaff-Edwards Co., 138 Wis. 442, 120 N. W. 269, 20 L. R. A. (N. S.) 1180; Halwas *v.* American Granite Co., 141 Wis. 137, 123 N. W. 789. It is undeniable that some of these decisions and many others in other jurisdictions have extended the meaning of the community of service essential to coemployeeship vastly beyond the original conception of a relation which gave opportunity for mutual acquaintance and watchfulness between fellow servants greater than exists between master and servant. We now confront an industry relatively new, at least in present development, where constantly employees must work in places which are rendered safe or unsafe by other

agents or employees hired to do the determining act for the very purpose of creating the safety—employees with whom the exposed workmen have no contact or community save that both are employed to carry on the general business of generating and distributing the master's merchandise, as are traveling salesmen and the janitor or elevator operator in his master's store. Reasons which may have led to classing as fellow servants men employed in conduct of railroads may fail to control situations in this field, though apparently closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take the proper and easy precautions, as in this case. A man at one moment is handling a cold and harmless wire which it is the duty of his master to keep so. The next he is in contact with a deadly peril, unforseeable and unescapable, by reason of the act of another whom his master has employed to perform the duty resting on the latter to make and keep safe the place of work. We think reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent. We think, too, that they are recognized and applied in such cases as Zentner *v.* Oshkosh, supra, and Smith *v.* Mil. E. R. & L. Co., supra, and that they should control this situation, although no very clear distinction may exist in principle from Williams *v.* Northern Wisconsin Lumber Co., supra, and Miller *v.* Centralia Pulp & Water Co., supra. It is at least apparent that this court has not yet established by clear precedent how far the recognized principles of co-employment extend in their application to the particular situations existing in this industry. They have, we think, been carried in some industries to the full extent compatible with either reason, public policy, or humanity, but such precedents should not lead to further extension to new conditions, even though a pretty close analogy appear. We hold, therefore, that a distinct and independent employee to whom is delegated the duty to disconnect and make safe the wires on which others must work is ordinarly a vice principal, and not a fellow servant, with the lineman and other like workmen. Whether Waldmann was such in this case was at least susceptible of affirmative answer by the jury, as also whether the place or appliances furnished decedent were rendered not reasonably safe by failure of the master's duty intrusted to Waldmann. It was error therefore to enter judgment of nonsuit.

Judgment reversed and cause remanded for new trial.

CHESAPEAKE & O. RY. CO. *v.* PARIS' ADM'R.

(Supreme Court of Appeals of Virginia, June 3, 1910.)

[68 S. E. Rep. 398.]

Carriers—Carriage of Passengers—Care as to Persons Accompanying Passenger.*—One who, according to a custom, goes to a railway station to assist a passenger in entering or leaving a train, is an invitee to whom the carrier owes the duty of ordinary care and, if he enters the train and his purpose is known, the carrier must give him a reasonable time within which to leave the train; but if his purpose is not known, and there are no circumstances to put the carrier upon notice, the carrier is not bound to hold the train until he has had time to alight, nor to notify him before the train starts.

Appeal and Error—Review—Findings—Conflicting Evidence.—A verdict upon conflicting evidence cannot be disturbed on writ of error, if there is sufficient evidence to sustain it.

Carriers—Injury to Invitee Alighting from Car—Negligence.—Where a person accompanying his daughter to a train upon which she was a passenger, though the carrier negligently started the train before he had time to alight, its negligence in such respect had ceased to operate when he attempted to alight from the moving train of his own accord, and his voluntary act in doing so was the proximate cause of his resultant injury, and the carrier was not liable therefor, though the brakeman in attempting to restrain his alighting may have unbalanced him and thereby contributed to his injury.

Negligence—Question of Law and Fact.—Negligence, whether contributory or otherwise, is a mixed question of law and fact, if the facts are doubtful, or about which reasonable men may differ; their determination being for the jury, but, if undisputed, the question being for the court.

Buchanan and Whittle, JJ., dissenting.

Error to Circuit Court, Augusta County.

Action by James R. Paris' administrator against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error.

Reversed.

R. L. Parrish and *J. M. Perry,* for plaintiff in error.

Charles & Duncan Curry and *Harry St. Geo. Tucker,* for defendant in error.

KEITH, P. This is the second time this case has been before this court. In the opinion upon the former writ of error, the circumstances under which the death of the plaintiff's decedent

*See note at end of case.

occurred, as they then appeared from the record, are stated, and upon the case then made it was held that the verdict of the jury against the railway company could not be sustained, and the cause was remanded for a new trial. See 107 Va. 408-411, 59 S. E. 398. Upon the next trial there was a demurrer to the evidence and judgment for the plaintiff again. To that judgment this writ of error was awarded.

The duty of a railway company to a person who, in conformity to a custom acquiesced in by the carrier, goes to a railway station to assist a passenger in entering or leaving the train, is declared. It was held that such a person is an invitee to whom the carrier owes the duty of ordinary care to see that he is not injured, and that, if he enters the train and his purpose is known, it is the duty of the carrier to give him a reasonable time within which to leave it; but if his purpose is not known, and there are no circumstances to put the carrier upon notice, then the carrier is not bound to hold the train till he has had time to alight, or to notify him before the train starts.

Upon the former writ it was not shown that the railway company had notice that the deceased was merely assisting his daughter on the train when he entered the car. The want of such notice, direct or circumstantial, was held on the former writ to relieve the railway company from the charge of negligence in starting its train before the plaintiff's decedent had gotten off. Upon the last trial, on this point the case was different. Two witnesses testified that the plaintiff's decedent, when he entered the car, inquired of a brakeman if he would have time to take his daughter's dress suit case into the car, set it down, and get off before the train started, and was told that he would, to "go ahead." That it had such notice, or that there was any such inquiry made, is denied by the railway company, and the preponderance of evidence, direct and circumstantial, is in favor of its contention; but on a demurrer to evidence the testimony of the two witnesses to the contrary must be taken as true. The evidence of the plaintiff tended further to prove that the deceased, when he assisted his daughter upon the train, found her a seat about the middle of the car, placed the dress suit case on the seat with her, told her goodbye, and started to leave the train, but was delayed in getting off because of the crowded condition of the car and the narrow passage through which he had to or did pass in making his way to the platform of the car; that when he reached the platform it was crowded, and persons were still getting on the train with bundles; that he asked the brakeman not to start the train until he could get off; that he was diligent in his effort to get off; that the day of the accident was Saturday before Christmas, which came on Monday; that the train was a local train, crowded when it reached Staunton, many of whose passengers were getting off; that a

large crowd there boarded the train; that the train's usual stop at that station was five minutes; that it only stopped the usual time that day; that, although the train was moving slowly when the deceased got on the steps to alight, he could have done so successfully but for the interference of a brakeman, who grabbed him and then let him go, unbalancing him, and thus preventing him from alighting safely.

Upon all material points the evidence of the railway company is directly in conflict with that of the plaintiff, and upon most of them preponderates. While upon the whole evidence the jury, as it seems to us, ought to have found a verdict for the defendant, yet, as the evidence was conflicting, the verdict of the jury cannot be interfered with, if there was sufficient evidence to sustain it.

We do not think the act of the brakeman, as testified to by the plaintiff's witnesses, makes out a case of negligence against the railway company. As was said in the opinion of the court on the former writ of error, it was the brakeman's duty to have attempted to protect the plaintiff's intestate from damage incident to his stepping off a moving train, and, if perchance disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

The case made by the evidence, it may be conceded, shows that the railway company was negligent in failing to give Paris a reasonable time within which to leave the train. The fact remains, however, that in attempting to alight from a moving train he was the author of his own wrong.

Negligence, whether contributory or otherwise, is a mixed question of law and fact. If the facts be doubtful, or about which reasonable men may differ, their determination becomes a question for the jury; but, where the facts are undisputed, the law applicable to them is a question for the court.

The decided cases with reference to alighting from moving trains are almost without number. Many of them deal with passengers alighting from street cars, and it is almost universally held that to alight from a slowing moving street car is not negligence per se. Where a passenger is invited to alight by an officer of the train, or is told that he may do so in safety, the cases hold that circumstances to justify his action, provided the train has not attained such a speed that the danger would be obvious; if he is induced to leap from the train by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carrier, he is entitled to recover for any injury he may have sustained thereby, although no injury would have occurred if he had remained quiet; and we admit that there are cases which have held the carrier responsible where there was no invitation extended, no assurance given, and no peril appre-

hended. But we are of opinion that the just and proper rule of decision is that which we understand to prevail in this state.

In Richmond & Danville R. Co. *v.* Morris, 31 Grat. 200, it appears that it was night when the train arrived at the station B.; that Morris had fallen asleep, and when approaching the station the conductor awakened him, telling him that they were at B. The train went a short distance beyond the freighthouse and reception room without stopping, and when the engine reached the frog on the west side of the freighthouse and reception room it stopped, and the conductor, seeing Morris still in the caboose asleep, again aroused him. The train stopped about a minute, and Morris could then have gotten off whilst the train was not in motion. The conductor then went to the other end of the car, and, looking back, saw that Morris did not get up. He returned, shook Morris, and told him to get up or get off; he was at B. Immediately after waking Morris the last time, the conductor went out at the end of the caboose with his lantern in his hand and stood on the stationary platform about two and a half feet from the platform of the car. The train commenced backing, and Morris got up and walked out to the end of the car and jumped off, not knowing, as he said, which way the car was going, and the caboose car and several others passed over him, injuring him severely. The point where Morris jumped off was opposite the platform, which extended 35 steps west and a much greater distance east of the pumphouse, and was that part of the platform at which passengers going east got off, and was in good condition. It was a dark, drizzly night, and the only lights at the station were two lanterns, one in the hands of the conductor and the other in the hands of a servant of the company at the station. Upon these facts this court held that: "The company was guilty of culpable negligence, and this negligence was the proximate cause of Morris' injury; that the conductor should not have put the train in motion until Morris could leave the car, or, if put in motion, he should have cautioned him not to attempt to get off until the train was stopped. Instead of this he told him to get off, and the train immediately commenced backing. The company was also in fault in not having stationary lights at the place, and this made it all the more incumbent on the conductor to exercise more than usual care and caution in letting off passengers. But whilst the injury sustained by M. is directly traceable to the culpable negligence of the company, the negligence or absence of ordinary prudence and caution on the part of M. contributed to his injury; and he is not entitled to recover of the company damages for the injury he sustained. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and common law. A plaintiff in such cases is entitled to no relief."

It is obvious, we think, that the case just cited was a far

stronger one in behalf of the passenger than the one under consideration. The court rightly characterized the conduct of the conductor as culpable negligence, and held that this negligence was the proximate cause of the injury to Morris; but Morris was in a place of safety, and in attempting to alight from a moving car was held to have brought the injury upon himself, and was therefore not entitled to relief. Judge Burks, who delivered the opinion of a unanimous court, cites the case of Railroad Co. *v.* Aspell, 23 Pa. 147, 62 Am. Dec. 323, and quotes with approval the following language of Chief Justice Black: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained. A railroad company is not liable for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in the train are also remiss in their duty. * * * From these principles it follows very clearly that, if a passenger is negligently carried beyond the station where he intended to stop and where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and labor of traveling back because these are the direct consequences of the wrong done to him. But if he is fool-hardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross negligence, for which he can blame nobody but himself. If there be any man who does not know that such leaps are dangerous, especially when taken in the dark, his friends should see that he does not travel on a railroad."

Continuing, Judge Burks says further: "It is to be borne in mind, however, that if a passenger is induced to leap from the carriage, whether by coach or railway, by a well-founded apprehension of peril to life or limb, induced by occurrences which might have been guarded against by the utmost care of the carriers, he is entitled to recover for any injury he may sustain thereby, although no injury would have occurred if he had remained quiet."

In Jammison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813, it was held that, if a passenger train fails to stop at a station to which a passenger has purchased a ticket, it is the duty of the passenger to retain his seat until he arrives at the next station at which the train stops; and, if he feels aggrieved, to institute his action against the company for any loss or injury he may have sustained by reason of the failure to stop the train at the proper station. But if he fails to do this, and, in passing from one coach to another in search of the coductor to get him to stop the train, he is thrown from the train and injured, his negligence is the proxi-

mate cause of the injury, and he cannot recover damages of the company therefor.

The person injured in this case was upon the train where he had the right to be as an invitee. He was in a place of safety. Had he elected to remain upon the train, his right of action was complete for whatever inconvenience he had suffered, or might suffer, as the direct consequence of the railroad company's negligence. But when he undertook to alight from the train, the negligence of the railroad company had ceased to operate, and it was the voluntary act of Paris which became the proximate cause of his injury.

As was said by this court in C. & O. Ry. Co. *v.* Wills, 111 Va. —, 68 S. E. 395: "The direct and efficient cause of the injury for which this suit was brought was the alighting from the train while in motion. In that act the railroad company had no part."

If it were conceded that Paris was not guilty of negligence in alighting from the train, we do not perceive that his case would be strengthened, for his act of alighting was the proximate cause of the injury. In order to recover, he must show negligence upon the part of the railroad company as the proximate cause of the injury for which he sues. He cannot recover merely because he was not guilty of a negligent act; and in this case the negligence of the railroad company had ceased to operate—was exhausted—and his alighting from the train, whether under conditions that convict him of negligence or not, is immaterial. If the act of the railroad was a mere condition and not the proximate and efficient cause of the injury, and if Paris in alighting from the train, under the circumstances disclosed in this record, was free from fault and guilty of no negligence, then the occurrence must be classed as an accident for which there can be no recovery.

It has often been held that the act of a responsible agent, intervening between the negligence of the railway company and the injury sued for, relieves the railway company of responsibility. If the intervening act of a third person has that effect, how much more where the person injured was himself the author of his own wrong.

But it is said that if this view prevail, and a person injured while leaving a moving train under circumstances similar to those under consideration is denied the right to recover for such injury, and is left to compensation for damages for the inconvenience, loss of time, and the labor of traveling back, which are the direct consequences of the act of the railroad company, the recovery in many instances would not adequately redress the wrong suffered. To this we reply that experience does not warrant the apprehension that courts and juries to do full justice to the citizen in such controversies; and that, even if this were not so, the difficulty or the inability to obtain full compen-

sation for an admitted wrong cannot be made the basis for a recovery against a railroad company in excess of just compensation for the injury which its negligence had occasioned, measured by the ascertained and established rules of law in such cases.

There is another view, which we think is not without merit. Where an injury is inflicted by a negligent act, it is the duty of the party injured by reasonable care to diminish the consequences of the wrong he has suffered, in the interest of the wrongdoer. This is not merely good law but good morals, and flows from that rule which has the highest possible sanction, that we should do unto others as we would have others do unto us.

Where a passenger has been wrongfully carried beyond his station, or has not been given a reasonable time to leave a train, this principle requires him to submit for the time to the situation, secure in his right ultimately to recover for the inconvenience he may suffer, but forbids him to step from a moving train, thereby inperiling his life and limb, and then turn around and ingraft the consequences of his own rash act upon the antecedent negligence of the railroad and recover for both.

For a full discussion of the doctrine of remote and proximate cause, we refer to C. & O. Ry. Co. *v.* Wills, supra, and the authorities there cited. As was said in that case, there is no evidence that any agent of the company directed, advised, encouraged, or even had knowledge of the intention of plaintiff's intestate to alight from the train, except the brakeman, whose conduct was held not to fix negligence upon the railroad company. There was in this case, as in that, the intervening act of a responsible agent, that agent being the plaintiff's intestate himself; and, while the railroad company was guilty of negligence in not giving a sufficient time for Paris to alight from the train, it cannot be said that the injury for which he sues was the natural and continuous sequence, unbroken by any new and independent cause, of that negligent act.

For these reasons we are of opinion that the judgment of the circuit court should be reversed, and this court will proceed to enter such judgment as the circuit ought to have rendered.

Reversed.

NOTE

PERSONS ACCOMPANYING OR MEETING PASSENGERS, DUTIES AND LIABILITIES OF CARRIER WITH RESPECT TO.

1. Not Entitled to Degree of Care Due Passengers, 668.
2. Not Trespassers, 668.
3. Licensees, 669.
4. Degree of Care, 673.
5. Station Premises, Carrier's Duty with Respect to Safety of, 674.
6. Present Merely for Purpose of Meeting or Taking Leave of Arriving or Departing Passengers, 675.

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1. NOT ENTITLED TO DEGREE OF CARE DUE PASSENGERS.

Persons upon a carrier's station premises or in its vehicles for the purpose of assisting departing or arriving passengers, or to take leave of or greet passengers, cannot be considered passengers themselves, nor are they entitled to as high a degree of care as a passenger. Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237, 64 S. E. 759; Missouri, etc., Ry. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

Boarding Train to Assist Woman and Children.—In Missouri, etc., Ry. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228, it is held that though a person boarding a train to assist a woman and her children to board it and procure seats for them is not entitled to that high degree of care that the railroad owes to a passenger, the railroad company must exercise ordinary care for his safety.

Father Assisting Invalid Daughter on Car Was a Passenger.—But in Evansville, etc., R. Co. *v.* Athon, 6 Ind. App. 295, 33 N. E. 469, it is held that where a father assisted his invalid daughter on the cars at a station, with the agreement with the carrier that the cars would stop long enough to allow him to place his daughter thereon, and to alight therefrom in safety, the relation of carrier and passenger existed between the father and the railroad, while he was assisting his daughter on the train, and departing therefrom.

2. NOT TRESPASSERS.

But such persons are not trespassers while in the carrier's re-

hicles or upon its station premises for such purposes. Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237, 64 S. E. 759; Morrow *v.* Atlanta, etc., Ry. Co. (N. Car.), 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, 46 S. E. 12; Whitley *v.* Southern Ry. Co. (N. Car.), 12 Am. & Eng. R. Cas., N. S., 210; Gulf, etc., Ry. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Huchinson *v.* Texas Cent. R. Co. (Tex. Civ. App.), 118 S. W. 1123; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

Boarding Train—Assistance Not Furnished by Carrier.—A person going on the train for the purpose of assisting a passenger to board it, when such assistance was needed and was not furnished by the carrier, was not a trespasser. So held in Morrow *v.* Atlanta, etc., Ry. Co. (N. Car.), 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, 46 S. E. 12.

Father Assisting Daughter and Small Children to Board Train—Conductor Notified of His Intention.—Plaintiff's daughter was accompanied by small children, and plaintiff had told defendant's conductor that he intended to assist her to board the train. It was held that plaintiff was not a trespasser and was entitled to protection from defendant. So held in Whitley *v.* Southern Ry. Co. (N. Car.), 12 Am. & Eng. R. Cas., N. S., 210.

At Depot to Meet Wife—Occasion to Seek Retired Place—Darkness—Fall in Hole.—In McKone *v.* Michigan Cent. R. Co., 51 Mich. 601, 17 N. W. 74, it appeared that plaintiff went to defendant's depot to meet his wife, who was expected to arrive on one of defendant's trains; and having occasion to seek a retired spot, no special resort being provided, stepped off the walk, in the darkness, upon a portion of the depot grounds, and fell into a hole. It was held that he was a customer of the railroad, and not a trespasser, and that he could maintain an action against the company for an injury sustained by him from the fall.

3. LICENSEES.

And, according to the almost undisputed doctrine, they are to be regarded as licensees, in the carrier's vehicles or upon its premises by the carrier's implied invitation.

Arkansas.—Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 58 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659; Little Rock, etc., Ry. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543; St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

Georgia.—Atlantic & Birmingham Ry. Co. *v.* Owens, 123 Ga. 393, 51 S. E. 344; Mason, etc., R. Co. *v.* Moore (Ga.), 15 Am. & Eng. R. Cas., N. S., 842.

Louisiana.—Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586.

Michigan.—McKone *v.* Michigan Cent. R. Co., 51 Mich. 601, 17 N. W. 74.

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North Carolina.—Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237, 64 S. E. 759.

South Carolina.—Johnson *v.* Southern Ry. Co., 53 S. Car. 203, 31 S. E. 212.

Texas.—Hutchinson *v.* Texas Cent. R. Co. (Tex. Civ. App.), 118 S. W. 1123; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41, 12 Am. & Eng. R. Cas., N. S., 214.

Virginia.—Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 27 R. R. R. 255, 50 Am. & Eng. R. Cas., N. S., 255, 59 S. E. 1095; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

England.—Watkins *v.* Great Western R. Co., 46 L. J. C. P. (Eng.), 817.

Those who go upon cars at railway station for the purpose of meeting and assisting the incoming or outgoing passengers in such "friendly offices as may be reasonably necessary for their convenience, comfort, and safety" are upon the premises by the company's implied invitation, and are not trespassers, and to them the company owes the duty of exercising reasonable care. So held in Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659.

Invited to Same Extent as Passenger.—In Watkins *v.* Great Western R. Co., 46 L. J. C. P. (Eng.), 817, Denman, J., said: "I regard the passenger's friend so permitted to go along * * * as not being in the nature of a person barely licensed to be there, but as being invited to the same extent as the passenger he accompanies, and who is there on lawful business in which the passenger and the company have both an interest."

Rationale of Doctrine.—In Little Rock, etc., Ry. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543, it is said in the opinion: "It is a matter of common knowledge that, in the usual conduct of the passenger business, it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for the security and convenience of the traveler, it has proven beneficial to carriers, and now prevails in this state and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. It cannot be doubted that it has increased travel and the earnings of carriers; and if it should be abrogated, many persons would be compelled to forego journeys, to the detriment of the carrier and their own inconvenience. We conclude that such attendant performs a service in the common interest of carrier and passenger, and that his entry is upon an implied invitation which entitles him to demand ordinary care of the carrier."

Accompanying Wife and Children—Premature Starting of Train.—Where plaintiff went to defendant's station to accompany his wife and children who intended to become passengers on defendant's

train, and plaintiff was injured by the premature starting of the train while he was endeavoring to place his wife's baggage aboard, plaintiff was on defendant's premises by its implied invitation, and defendant was therefore bound to exercise ordinary care for his safety. So held in Chesapeake & O. Ry. Co. *v.* Fortune (Va.), 27 R. R. R. 255, 50 Am. & Eng. R. Cas., N. S., 255, 59 S. E. 1095.

Woman and Little Girl Assisted by Stranger—Failure of Carrier to Object—Sudden Jolt.—In Macon, etc., R. Co. *v.* Moore (Ga.), 15 Am. & Eng. R. Cas., N. S., 842, it is held that where a lady, accompanied by a little girl and encumbered with hand baggage and parcels, which she cannot, unaided, place promptly and safely upon the train, and has, consequently, to procure the aid of another in carrying her baggage aboard, such other person has a right on the train for such purpose, especially when the agent of the carrier sees the situation of the passenger, offers no assistance himself, and does not object to such assistant of the lady going upon the train. In such a case the fact that the sudden jolting or jerking of the train on starting throws the man so accompanying the lady, with a valise, against her, and causes him to thus knock her upon the seat, whereby she is injured, without fault upon the side of either, does not relieve the company from liability.

At Depot to Meet Arriving Passenger for Business Consultation —Negligence in Unloading Gravel Train—Struck by Released Cable. —If a person is upon depot premises, in pursuance of the purpose of meeting for business consultation a person who he has reason to believe was to take a train there as a passenger, the railroad owed him the duty of ordinary care in conducting the unloading of a gravel train standing upon a track which formed a curve adjacent to its depot grounds. In this case it appeared that the unloading was done by means of a plow at one end of the train, propelled by a locomotive at the other, connected by a steel cable which was kept over the cars by means of pulleys and stay ropes fastened to the sides of the cars on the outer line of the circle; and that while in operation, one of the stay ropes broke, releasing the cable, which struck plaintiff, who was standing near the depot. So held in Klugherz *v.* Chicago, etc., R. Co., 90 Minn. 17, 95 N. W. 586.

Person Intending to Become Passenger if Appointment with Passenger Is Met.—A railroad owes the duty of having its station premises in a safe condition for the use of one who, having an appointment with a passenger, enters such premises, intending, in case the appointment be met, to become a passenger himself. So held in Texas, etc., Ry. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224.

At Depot to Continue Negotiation with Arriving Passenger.—A person went to a depot to meet an incoming passenger with whom he had an engagement to meet for the purpose of continuing a business negotiation between them. It was held that the railroad was liable to such person for injuries received by him because of

the negligence of the company in permitting its station platform to become in a dangerous condition, on account of which he fell and was injured. Atchison, etc., Ry. Co. *v.* Cogswell (Okl.), 99 Pac. 923.

Husband Assisting Wife to Board Train—Assault by Person in Station—Carrier Not Liable.—But where a husband went to defendant's station with his wife to assist her in boarding defendant's train, but without any intention of becoming a passenger, he was only entitled to the rights of a licensee, and was not entitled to recover against the company for any assault or indignity sustained by him at the hands of a disorderly person permitted to remain in the station. So held in Houston, etc., Co. *v.* Phillio (Tex.), 5 R. R. R. 277, 28 Am. & Eng. R. Cas., N. S., 277, 69 S. W. 994.

Wife at Station after Closing Time to Find Husband—Darkness—Hole in Platform.—And in Sullivan *v.* Minneapolis, etc., Ry. Co., 90 Minn. 90, 97 N. W. 114, it appeared that plaintiff visited the station house of defendant railroad during the evening for the purpose of finding her husband, who, she supposed, had gone there to transact business with the company. It was after the regular evening passenger train had arrived and departed, the depot was closed to the public, and the lights in the office and on the platform had been turned out, and the agent had departed. The premises were dark, and in going along the platform towards the office plaintiff stepped into a hole and was injured. It was held that conceding that defendant was guilty of negligence in not exercising ordinary care as to the condition of the platform, plaintiff could not recover, for the reason that under the circumstances defendant owed her no duty, and she went upon the station premises at her peril.

Persons Accompanying Man on Freight Train in Charge of Stock.—And the rule that it is the duty of a railroad company to have its station platform reasonably safe for persons accompanying an intending passenger who is about to take a train in the course of regular passenger traffic, does not extend to the case of persons accompanying one who is about to leave in a freight car in charge of live stock, although he has been allowed to load such stock into the car at the freight platform on one side of the station, instead of at the stock-yard as was customary, from which place the car was to be taken in the night by a freight train which did not usually stop at that station and was not allowed to carry passengers and for which the station was never kept open, and although he and his friends had been allowed by the agent to occupy the waiting room. So held in Dowd *v.* Chicago, etc., R. Co., 84 Wis. 105, 54 N. W. 24.

Passenger Transporting Baggage of One Not a Passenger—Latter on Train to Assist with His Baggage—Collision between Locomotive and Car.—So in Andrews *v.* Ft. Worth, etc., Co. (Tex. Civ. App.), 25 S. W. 1040, where the complaint alleged that plaintiff procured P., about to become a passenger on plaintiff's train, to transport

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his baggage; that it was defendant's custom to permit persons to assist passengers with their baggage into its trains; and that plaintiff assisted P. to enter defendant's train with plaintiff's baggage; and, while leaving the car, was injured by the careless and wanton conduct of defendant in causing the locomotive to run into the car. It was held that the complaint was demurrable, since plaintiff was a trespasser on the train, and defendant was bound to abstain from injuring him only after becoming aware of his danger.

School Boy at Station Merely to See Delegates to School Exhibition.—And where a boy of 11 years of age went to a railroad station to meet the delegates to a school exhibition, the delegates being older than he, and not in his class, his purpose being, as he testified, "to see whoever came," and after he went upon the platform of a car he was injured by the sudden backing of the train, he was at most a naked licensee. So held in Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659.

On Station Platform as Mere Spectator.—And in Burbank *v.* Illinois Cent. R. Co., 42 La. Am. 1156, 8 So. 580, it is held that a person who goes to a railroad station house and on its platform, not for the purpose of any business, or to meet expected friends, or to see friends depart, but as a mere spectator for his own pleasure and convenience, is there at his own risk and peril, and cannot recover for personal injuries received in consequence of a defective platform.

4. DEGREE OF CARE.

And such person is entitled to ordinary care from the carrier until he has had a reasonable time to accomplish his purpose and depart from the carrier's premises.

Arkansas.—Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659; Little Rock, etc., Ry. Co. *v.* Lawton, 55 Ark. 428, 18 S. W. 543; St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

Colorado.—Denver, etc., R. Co. *v.* Spencer (Colo.), 18 Am. & Eng. R. Cas., N. S., 236.

Georgia.—Atlantic & Birmingham Ry. Co. *v.* Owens, 123 Ga. 393, 51 S. E. 344.

Indiana.—Louisville & N. R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31; New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

Missouri.—Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 8 Am. Ry. Rep. 462.

New York.—Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145.

North Carolina.—Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237, 64 S. E. 759; Whitley *v.* Southern Ry. Co. (N. Car.), 12 Am. & Eng. R. Cas., N. S., 210.

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Oklahoma.—Atchinson, etc., Ry. Co. *v.* Cogswell (Okl.), 99 Pac. 923.

Tennessee.—Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

Texas.—Gulf, etc., Ry. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Huchingson *v.* Texas Cent. R. Co. (Tex. Civ. App.), 118 S. W. 1123; Missouri, etc., Ry. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228.

Virginia.—Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

Where a railroad permits one accompanying a passenger to enter its car, it owes him ordinary care until he leaves it. So held in Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145.

A railroad is liable for the death of a person, while he is at the station for the purpose of meeting his daughter, a passenger, expected to arrive upon one of its trains, where the death is caused by the negligence of its employees, without contributory negligence. So held in Denver, etc., R. Co. *v.* Spencer (Colo.), 18 Am. & Eng. R. Cas., N. S., 236.

Escorting Friend to Car—Killed on Track by Backing Engine—Speed—Lookout.—In St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347, it appeared that deceased escorted a friend to his car, which was open for passengers, and on his return, while crossing an intervening track, was killed by an engine which was being backed at a high rate of speed, without sufficient lookout and without warning. It was held that, whether deceased was on the track as a mere licensee or by implied invitation of the company, the latter was guilty of actionable negligence.

5. STATION PREMISES, CARRIER'S DUTY WITH RESPECT TO SAFETY OF.

To a person on its station premises to assist or greet a departing or incoming passenger, the carrier owes the duty to exercise reasonable care to keep them in a safe condition, and is liable in damages for injuries sustained by him by reason of its failure to do so. Gillis *v.* Pennsylvania R. Co., 59 Ga. 129; New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Atchinson, etc., Ry. Co. *v.* Cogswell (Okl.), 99 Pac. 923; Gulf, etc., Ry. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653; Hamilton *v.* Texas & Pac. Ry. Co., 64 Tex. 215; Texas, etc., Ry. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

A person accompanying passengers to assist them in entering a train has at least a tacit invitation from the carrier, and the carrier must exercise at least ordinary care to avoid injuring them by defective stational facilities of approaches thereto. So held in Chesa-

peake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

It is the duty of the railroad to keep its station premises in a safe condition for the use of a friend of its passenger, assisting him in entering or leaving its cars. So held in Texas, etc., Ry. Co. *v.* Best, 66 Tex. 116, 18 S. W. 224.

In Hamilton *v.* Texas & Pac. Ry. Co., 64 Tex. 251, it is held that a railroad must provide and maintain safe approaches to its stations and safe station platforms, and is liable for injuries occasioned by its negligence in this respect to those who are on its station premises for the purpose of welcoming or bidding farewell to passengers.

Construction and Lighting of Station Platform.—A railroad company owes to one going to a station at night to meet a relative arriving by train the duty of ordinary care with respect to the construction of and lighting the station platform. So held in Gulf, etc., Ry. Co. *v.* Williams, 21 Tex. Civ. App. 469, 51 S. W. 653.

Strength of Station Platform.—A railroad company is bound, for the safety of those who come upon its station platform to meet or part with passengers, to have the platform strong enough to bear all who can stand upon it. So held in Gillis *v.* Pennsylvania R. Co., 59 Pa. 129.

6. PRESENT MERELY FOR PURPOSE OF MEETING OR TAKING LEAVE OF ARRIVING OR DEPARTING PASSENGERS.

a. General Rule.

And, according to the greater weight of authority, the fact that a person accompanies or meets a passenger merely for the purpose of greeting an arriving passenger or to take leave of a departing passenger, and not to render assistance, does not deprive him, in any degree, of the protection of the preceding rule. New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871; Atchinson, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 8 Am. Ry. Rep. 462; Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

A railroad company is liable for injuries caused by the want of ordinary care, where the person injured by reason thereof was at a train to meet with, or part from, a passenger, although not himself a passenger. So held in Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 8 Am. Ry. Rep. 462.

A railroad, as a common carrier of passengers, is liable for negligent injuries to persons who visit its stations or landings to meet friends expected to arrive on trains or boats or to see friends depart on trains or boats. So held in Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, 31 S. W. 737.

Stations and Platforms in Safe Condition.—It is the duty of a railroad company to keep its stations and station platforms in a reason-

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ably safe condition, and to have them reasonably well lighted, for the safety of those who are there to meet friends arriving as passengers on trains or to see friends or guests depart on trains. So held in New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

Injured by Negligence in Handling Baggage.—In Atlantic & Birmingham Ry. Co. *v.* Owens, 123 Ga. 393, 51 S. E. 344, it is held that a railroad owes to one who comes to its passenger station to receive a friend or guest upon arrival ordinary care for his safety while at the station, and is liable for an injury resulting fom the negligence of an employee in handling baggage.

Compared with Person at Station to Transact Business with Company's Agent.—In Atlantic & Birmingham Ry. Co. *v.* Owens, 123 Ga. 393, 51 S. E. 344, it is said in the opinion: "The company owes to one who goes to its station for the purpose of meeting an incoming passenger the same duty, in regard to the station and the conduct of its employees thereat, as it does to any person going there for the purpose of transacting business with an agent of the company."

At Station to Bid Farewell to Husband.—Plaintiff when accompanying her husband to a train upon which he was to depart, was on the carrier's premises by its implied invitation, and the carrier was bound to exercise ordinary care for her safety. So held in Fortune *v.* Southern Ry. Co. (N. Car.), 34 R. R. R. 237, 57 Am. & Eng. R. Cas., N. S., 237, 64 S. E. 759.

b. Contrary View.

But there are decisions to the contrary, holding that a person upon cars or station premises merely to meet or greet acquaintances or relations arriving or departing as passengers, and not to render assistance to passengers, are bare licensees, and not to be deemed as holding an implied invitation from the carrier. Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659; Illinois Cent. R. Co. *v.* Wall, 53 Ill. App. 588; Galveston, etc., Ry. Co. *v.* Matzdorf (Tex.), 31 R. R. R. 95, 54 Am. & Eng. R. Cas., N. S., 96, 112 S. W. 1036.

Where a person is on the station platform of a railroad company merely as a spectator, waiting the arrival of a friend upon an incoming train, the company will be liable for injuries sustained by him through gross negligence or recklessness of its employees. So held in Illinois Cent. R. Co. *v.* Wall, 53 Ill. App. 588.

At Depot Merely to Say Good-By to Acquaintance.—In Galveston, etc., Ry. Co. *v.* Matzdorf (Tex.), 31 R. R. R. 95, 54 Am. & Eng. R. Cas., N. S., 96, 112 S. W. 1036, it is held that a person who goes to a depot merely as an acquaintance of and to say good-by to a departing passenger, and not as an attendant of or to assist her, is not there on an implied invitation of the carrier, but as a mere licensee, to whom it owes no duty to keep the waiting room and its approaches in a safe condition.

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Merely to Meet and Greet Friends or Relations.—One who goes upon the premises of a railway company, or upon its cars, out of mere curiosity, or for the pleasure of simply meeting and greeting friends or relations, or of seeing strangers, but with no idea or purpose of rendering any assistance to incoming or outgoing passengers, is not there upon an invitation of the company. So held in Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659.

One Returning to Car, without Necessity, after Escorting Passenger to It.—One who, after escorting a passenger to his car, returns to it without necessity and merely for his own pleasure, is a bare licensee, and cannot be said to have returned upon an implied invitation of the carrier, which owes him no duty save to do him no wanton injury and to comply with the statutory requirements as to keeping a lookout. So held in St. Louis, etc., R. Co. *v.* Tomlinson, 69 Ark. 489, 64 S. W. 347.

c. Custom to Permit, Effect of.

And it has been held that a custom on the part of a railway company, however long continued, to permit people to go upon its cars merely for the purpose of meeting or seeing incoming passengers, but not for the purpose of rendering them any assistance, does not constitute them anything more than naked licensees. Arkansas & L. Ry. Co. *v.* Sain (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579, 119 S. W. 659.

7. MAY ENTER CAR.

A person accompanying or assisting a passenger has the right, as a general rule, not only to board the train, but also to enter the passenger's car. Macon, etc., R. Co. *v.* Moore (Ga.), 15 Am. & Eng. R. Cas., N. S., 842; St. Louis, etc., Ry. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

In St. Louis, etc., Ry. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407, it is held that where a railroad makes no provision for assisting passengers to seats when necessary, a person accompanying a passenger needing such assistance may enter the car for the purpose of rendering it, and may rely upon the information furnished by the brakeman stationed at the car steps to assist passengers to get on and off the car as to length of time the train will remain at the station.

8. CARRIER NOT REQUIRED TO ASCERTAIN PURPOSE FOR BOARDING TRAIN.

It is not the duty of the carrier to inquire of persons boarding its trains to assist or take leave of passengers in regard to their intentions, and it has the right to presume that they are passengers until actually or constructively notified to the contrary. Seaboard A. L. Ry. Co. *v.* Bradley (Ga.), 24 R. R. R. 83, 47 Am. & Eng. R. Cas., N. S., 183, 54 S. E. 69.

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9. NOT REQUIRED TO HOLD TRAIN UNLESS CHARGEABLE WITH NOTICE OF PERSON'S INTENTION TO ALIGHT.

And where a person boards a train and enters a car for the purpose of assisting a passenger to a seat, or merely to bid him farewell, the carrier is under no obligation to hold the train beyond the usual time, in order to give such person an opportunity to alight, unless it has actual or constructive notice of his intention to disembark.

Georgia.—Seaboard A. L. Ry. Co. *v.* Bradley (Ga.), 24 R. R. R. 183, 47 Am. & Eng. R. Cas., N. S., 183, 54 S. E. 69.

Illinois.—Keokuk Packet Co. *v.* Henry, 50 Ill. App. 264.

Indiana.—Louisville & N. R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186.

Kentucky.—Berry *v.* Louisville & N. R. Co. (Ky.), 20 Am. & Eng. R. Cas., N. S., 401, 60 S. W. 699; Cole's Adm'r *v.* Chesapeake & O. Ry. Co. (Ky.), 31 R. R. R. 453, 54 Am. & Eng. R. Cas., N. S., 453, 113 S. W. 822; Louisville & N. R. Co. *v.* Wilson (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830, 100 S. W. 290.

Missouri.—Yarnell *v.* Kansas City, etc., Ry. Co., 113 Mo. 570, 21 S. W. 1.

New York.—Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145.

Texas.—Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203; Oxsher *v.* Houston, etc., Ry. Co., 29 Tex. Civ. App. 420, 67 S. W. 550; Texas & P. Ry. Co. *v.* McGilvary (Tex. Civ. App.), 29 S. W. 67.

Virginia.—Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

A carrier is not liable for the death of one who falls from a moving train after accompanying a passenger into a car, in the absence of evidence that its servants had actual or constructive notice that deceased intended to leave the train and did not intend to take passage thereon. So held in Cole's Adm'r *v.* Chesapeake & O. Ry. Co. (Ky.), 31 R. R. R. 453, 54 Am. & Eng. R. Cas., N. S., 453, 113 S. W. 822.

Must Notify Carrier as to Intention.—A person who boards a train merely to assist a passenger to a seat must give notice of his intention to get off, to hold the railroad liable for not giving him time therefor; the train having stopped the usual and a reasonable time for passengers to get off and on. So held in Dillingham *v.* Pierce (Tex. Civ. App.), 31 S. W. 203.

Must Request Trainman to Stop Train.—In Texas & P. Ry. Co. *v.* McGilvary (Tex. Civ. App.), 29 S. W. 67, it is held that where a person boards a train to assist a friend thereon, intending to get off as soon as his friend is seated, but the company has no notice of his intention, and he is injured in an attempt to alight from the train while it is moving, the railroad is not liable, where the train stopped the usual time, and plaintiff, before attempting to alight, did not request the trainman to stop the train.

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Attempting to Alight from Moving Train.—Where plaintiff went into a car for the purpose of seating his wife and children, the carrier, having neither actual nor constructive notice that he intended to get off before the train started, did not owe him any duty to give him notice before starting the train, or to hold it beyond schedule time for departure; and it is, therefore, not liable for an injury to plaintiff resulting from his act in attempting to alight after the train was in motion. So held in Berry *v.* Louisville & N. R. Co. (Ky.), 20 Am. & Eng. R. Cas., N. S., 401, 60 S. W. 699.

Duty to Have Employee at Foot of Car Steps to Hold Train.—In Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145, it is held that a railroad company is not negligent, as a matter of law, in failing to have an employee stationed at the foot of car steps to hold a train until a person who has accompanied a passenger into the car leaves it, when such person only signifies his intention of leaving by his act of alighting.

10. NOTICE AS TO STARTING OF TRAIN, DUTY TO GIVE.

And, of course, there exists no duty to notify such a person of the intention to start the train, where the carrier is not chargeable with notice that he is not a passenger and intends to alight before the train starts. Coleman *v.* Georgia R. & B. Co., 84 Ga. 1; Louisville & N. R. Co. *v.* Espenscheid, 17 Ind. App. 558, 47 N. E. 186; Berry *v.* Louisville & N. R. Co. (Ky.), 20 Am. & Eng. R. Cas., N. S., 401, 60 S. W. 699; Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

Though a person assisting a passenger in boarding a train has a right to enter the train in conformity with a practice acquiesced in by the carrier, he should inform those in charge of his purpose; and, where they have no actual or constructive notice that he intends to disembark, they are not bound to hold the train, nor to notify him before it starts. So held in Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

One who gets upon a fast mail train during one of its fixed stops at a station, where these stops are too short for him to transact his business and get off, has no right to notice, by signal or otherwise, to alight before the train resumes its journey; it not appearing that the conductor or other proper agent of the carrier knew that he had come aboard, nor that there was any usage or custom to give notice or make signals for the benefit of such visitors. So held in Coleman *v.* Georgia R. & B. Co., 84 Ga. 1, 10 S. E. 498.

Must Give Usual Notice.—Where plaintiff had in charge a lady and her infant son, for the purpose of assisting them to board defendant's train as passengers, it was held that he was entitled to

have sufficient time to escort her to a seat in a car and then to leave the train in safety. And if the time of stopping was too short, or if the agent of the road failed to give the usual notice of the starting of the train, there was not an exercise of such ordinary care as the company was bound to employ in order to escape liability. So held in Doss *v.* Missouri, etc., R. Co., 59 Mo. 27, 8 Am. Ry. Rep. 462.

11. WHEN CHARGEABLE WITH NOTICE OF INTENTION IN BOARDING TRAIN.

But if the carrier was chargeable with notice of the person's intention in boarding the train and entering a car, the train must be held a reasonable time to give him an opportunity to accomplish his rightful purpose and alight. Southern Ry. Co. *v.* Patterson (Ala.), 21 R. R. R. 283, 44 Am. & Eng. R. Cas., N. S., 283, 41 So. 964; Cooper *v.* Atlantic C. L. R. Co., 78 S. Car. 562, 59 S. E. 704; Johnson *v.* Southern Ry. Co., 53 S. Car. 203, 31 S. E. 212; International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41, 12 Am. & Eng. R. Cas., N. S., 214; Missouri, etc., Ry. Co. *v.* Miller, 15 Tex. Civ. App. 428, 39 S. W. 583; St. Louis, etc., Ry. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407.

If a railroad company, in anyway, has notice that one entering its passenger car did so for the purpose of assisting a passenger to board and procure a seat, it owes him the duty of giving him sufficient time to disembark. So held in Cooper *v.* Atlantic C. L. R. Co., 78 S. Car. 562, 59 S. E. 704.

In Johnson *v.* Southern R. Co., 53 S. Car. 203, 31 S. E. 212, it is held that when a passenger, in feeble health, or encumbered with baggage or other impediment, is not assisted by the railroad's servants in boarding a train, any person may assist her, and the company is bound to give such person sufficient time to leave the train, if its servants have notice of her purpose of entry.

In Southern Ry. Co. *v.* Patterson (Ala.), 21 R. R. R. 283, 44 Am. & Eng. R. Cas., N. S., 283, 41 So. 964, it is held that where one boards a train solely for the purpose of assisting an old lady, nearly blind, at her request, to take passage on it, and before doing so approached the conductor and told him of her condition and need of assistance, and been requested by him to render such assistance, so that the conductor was bound to know of his intention to alight before the train started, it is the duty of the conductor to give him a reasonable time to alight before starting the train; and not having done so, and such person has in consequence been injured in alighting, without any contributory negligence, after the starting of the train, the carrier is liable therefor.

Duty Affected by Length of Stop.—But in Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145, it is held that there is no obligation upon a railroad to hold a train until every

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person not a passenger leaves the same, irrespective of the time of the stop made at the station.

12. NOTICE OF INTENTION IN BOARDING TRAIN, SUFFICIENCY OF—ILLUSTRATIONS.

a. Not Sufficient Notice.

Person Seen Walking in Aisle and Approaching Car Platform.—In Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145, it is held that the fact that trainmen saw a person who accompanied a passenger into a car walking in its aisle, and coming out on the platform, did not require them to delay giving the signal for the train to start.

Descending Car Steps.—The mere fact that one who had accompanied a passenger into a car descended onto its steps was not sufficient to render the conduct of the trainmen in starting the train negligence. So held in Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145.

Boarding Train with Grandchildren.—Where a train stopped its usual length of time at a station, during which plaintiff, with baggage in her hand and without explaining her purpose, got on the train to assist her grandchildren, who were with her and were to be passengers, there was no notice to the trainmen that she did not intend to remain on the train. So held in Louisville & N. R. Co. *v.* Wilson (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830, 100 S. W. 290.

Woman with Two Small Children—Only Half-Fare Ticket Purchased.—In Louisville & N. R. Co. *v.* Wilson (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830, 100 S. W. 290, it is held that where a woman accompanying two small children purchased a half-fare ticket, and the agent asked if it was for a particular small child; the other being evidently too small to pay fare, and she answered that it was, that she was sending the children to their mother, these facts, with the further fact that no ticket was bought for herself, were not sufficient to charge the ticket agent with notice that she was going aboard only to assist the children.

b. Notice Sufficient.

Invited by Brakeman to Enter Car with Wife.—Where plaintiff accompanying his wife, who was a passenger, was assured by the brakeman at the car steps that the train would not start for three or four minutes, and was invited to enter the car with his wife, it was the carrier's duty to hold the train for a time reasonably sufficient to enable him to enter the car, procure a seat for his wife and alight in safety. So held in St. Louis, etc., Ry. Co. *v.* Cunningham, 48 Tex. Civ. App. 1, 106 S. W. 407.

Notifying Porter and Brakeman of Intention—Conductor Acting upon Their Statement in Starting Train.—Where one entering a

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car to assist a passenger states to a porter and brakeman in attendance that he desires to get off, and the conductor, in starting the train, acts upon the statement of such porter and brakeman that it is "all right," the railroad is as much chargeable with the notice given that such person desired to leave the train as if it had been given to the conductor directly. So held in Missouri, etc., Ry. Co. *v.* Miller, 15 Tex. Civ. App. 428, 39 S. W. 583.

Seen by Conductor to Escort Woman into Car after Leaving One on Station Platform.—In International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41, 12 Am. & Eng. R. Cas., N. S., 214, it appeared that it was customery for male relations of female passengers to escort the latter into defendant's cars; and that plaintiff, at four o'clock in the morning, was seen by the conductor and brakeman to escort a lady into the car, after leaving another lady, by whom he was accompanied, on the station platform. It was held that such evidence tended to show that defendant's servants knew that plaintiff boarded the car merely as an escort.

Facts for Jury.—If the conductor of a train stands near enough to see a husband assist a wife to board a train, who is not offered help by the railroad officers, and to hear a conversation between them as to baggage, and does not stop the train long enough to permit him to get off, such facts must go to the jury on the question of negligence. So held in Johnson *v.* Southern R. Co., 53 S. Car. 203, 31 S. E. 212.

Whether Every One Boarding Steamboat Is a Passenger—Presumptions.—In Keokuk Packet Co. *v.* Henry, 50 Ill. 264, it is held that where a steamboat lands at one of its usual stopping places for taking on passengers and freight, it is not a presumption of law that every person who comes on board does so as a passenger, unless he told an officer of the boat to the contrary, so as to relieve the officers from the duty of giving to such as do not come aboard as passengers, proper time and facilities for getting ashore.

13. CONTRIBUTORY NEGLIGENCE—ILLUSTRATIONS.

a. Guilty of.

Alighting from Moving Train.—Where plaintiff boarded a train to assist a passenger, her jumping off after the train started was contributory negligence precluding her recovery for injury. So held in Louisville & N. R. Co. *v.* Wilson (Ky.), 22 R. R. R. 830, 45 Am. & Eng. R. Cas., N. S., 830, 100 S. W. 290.

Same.—Where a father, in conformity with a known custom of travel, attends his daughter at her request, under circumstances rendering such attendance necessary, to aid her and her infant children to enter a train and procure seats as passengers, enters a car and the train starts before he has finished his undertaking, he must either remain until he can make known his wish to alight, or

assume the risk of alighting while the train is in motion. So held in Coleman *v.* Georgia R. & B. Co., 84 Ga. 1, 10 S. E. 498.

Same.—In Lucus *v.* New Bedford & T. R. Co., 6 Gray (Mass.), 64, it is held that if a person who entered railroad cars, not as a passenger, but for the purpose of assisting an aged and infirm relative to take a seat as a passenger, attempts to leave the cars after they have started, or, finding them in motion as he is going out, persists in trying to alight, he cannot maintain an action against the carrier for injuries if his attempt causes or contributes to them, even if the carrier gave him no special notice of the time of the departure of the cars, and was guilty of negligence in starting the cars, which negligence also contributed to the injuries.

Same.—If it was a fault on the part of the railroad company that none of its servants helped in putting two children and a bag into a car of a train, when no request to do so was made by the mother of the children having them in charge, such fault was too remote to make the company liable for an injury to the woman while stepping from the train when it was in motion after putting the children and bag on board. So held in Flaherty *v.* Boston & Maine R. Co., 186 Mass. 567, 72 N. E. 66.

Same—Direction of Brakeman.—In Flaherty *v.* Boston & Maine R. Co., 186 Mass. 567, 72 N. E. 66, it is held that if a woman enters a car of a railroad train, not as a passenger, but to help her two children on board, and attempts to leave the train after it has started and is injured, she cannot recover from the railroad on the ground that the brakeman, when she found the gate of the car platforms closed, beckoned her to the next platform, saying as he helped her down the steps: "It is all right, not going very fast, be careful."

Train Stopped Some Distance from Depot—Darkness—Fall into Culvert.—In Stiles *v.* Atlanta & W. P. R. Co., 65 Ga. 370, 8 Am. & Eng. R. Cas. 195, it is held that where defendant's passenger train was temporarily stopped at some distance from the depot used for receiving and discharging passengers, until two freight trains could be moved out of the way, and plaintiff boarded the train in search of his wife and child, who were passengers thereon, and in attempting to move from one car to another, by passing around an intervening car, slipped off the platform into a deep culvert, which he could not see on account of the darkness of the night, the company was not liable for his injuries thereby sustained, even though the lights in some of the cars had been blown out by drunken men.

Alighting from Moving Train—Injury Caused by Interference of Brakeman.—Where a brakeman in good faith makes an unsuccessful attempt to prevent one who had assisted a passenger to board a train from alighting after it had started, the railroad is not liable for the person's injury, although he might have alighted in safety had the brakeman not interfered. So held in Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 26 R. R. R. 626, 49 Am. & Eng. R. Cas., N. S., 626, 59 S. E. 398.

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Assisting Passenger to Carry Trunk Along Station Platform—Struck by Bumper of Engine—Speed—Question for Jury.—In Langan *v.* St. Louis, etc., Ry. Co., 72 Mo. 392, 3 Am. & Eng. R. Cas. 355, it appeared that plaintiff went to defendant's railway station for the purpose of helping to carry a trunk for a friend, who was about to take passage on one of defendant's trains. Having bought a ticket, plaintiff and his friend took the trunk to a platform pointed out by the ticket agent. There was at that time no train in sight, but one was due and expected to arrive at any moment. The view of the train was unobstructed as far as a bridge about 400 yards distant in the direction from which the train was to come. Plaintiff and his friend, carrying the trunk between them, were walking in the other direction, along the platform when plaintiff was suddenly struck from behind and injured by the bumper of the engine of the expected train. The bumper projected eighteen inches over the platform, which was from five to eight feet wide. There was a number of other persons on the platform. The testimony was conflicting as to whether the train bell was rung or whistle sounded after the train passed through the bridge; but it tended to show that the grade from the bridge was an up-grade; that the engine was being run at an unusually fast rate of speed; that the engineer, after crossing the bridge, saw the persons on the platform; that he saw plaintiff before he was struck, sounded the alarm whistle and reversed the engine, but the brakes were not put down; that after being struck, plaintiff was carried about eight feet, when the engine stopped. It was held that the trial court was warranted in submitting to the jury the question whether plaintiff was injured by his own fault or of that of defendant.

b. Not Guilty of.

Alighting from Moving Train.—In International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41, 12 Am. & Eng. R. Cas., N. S., 214, it is held that the failure of one who entered a passenger car of defendant's train for the purpose of escorting his sister to a seat to request the brakeman to stop the train to enable him to alight therefrom, will not deprive him of the right to recover for injuries sustained while alighting, if the attempt was consistent with ordinary prudence.

Alighting from Moving Train—Started Too Soon.—One who enters a train for the purpose of escorting his aged sister to a seat and intends to leave as soon as he renders the proper assistance, of which fact the brakeman had notice, may recover for injuries sustained in attempting to alight while the train is in motion, where it is started without allowing him reasonable time to accomplish his purpose, and he is not guilty of negligence in making the attempt. So held in International, etc., R. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41, 12 Am. & Eng. R. Cas., N. S., 214.

Same—Same—Speed Suddenly Increased.—In Louisville & N. R. Co. *v.* Crunk, 119 Ind. 542, 21 N. E. 31, it is held that where one enters

a train at a station to assist in carrying into a car a sick passenger, and while in the car the train is started before he has had a reasonable time to get off, yet at a rate of speed so slow as to enable him to alight in safety, but after he had reached the platform of the car and is in the act of alighting the speed is so suddenly and greatly increased, through the negligence of the trainmen, as to throw him off and injury him, the company is liable.

Same—Darkness—Direction of Conductor.—In Missouri, etc., Ry. Co. *v.* Hibbitts, 49 Tex. Civ. App. 419, 109 S. W. 228, it was held that a person, after assisting a passenger to a seat in the car, was not guilty of contributory negligence in alighting from the slowly moving train in the dark, as he, being inexperienced in regard to such matters, had the right to so alight in obedience to the conductor's direction.

Custom for Brakeman to Hold Train—Right to Act on Assumption of Its Observance.—In Dunne *v.* New York, etc., R. Co. (N. Y. App. Div.), 91 N. Y. Supp. 145, it is held that where it was the custom of a railroad company to station a brakeman at the foot of car steps, who was not to give the signal for the train to start until all persons, including those in the act of alighting, had reached the ground in safety, a person who accompanied a passenger into the train and knew of the custom, had a right to act on the assumption that it would be observed; but if he was not aware of the custom, his rights were not affected by its existence.

Attempting to Warn Children of Danger—Struck by Side Brake While on Walk on Station Grounds.—In Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, 2 So. 586, it appeared that plaintiff went to defendant's station to meet some families of laborers who arrived on a passenger train; and shortly after he arrived there he observed that some children of the party were on the main track, and noticing that another train was approaching, he walked upon an elevated plank walk, constructed by defendant alongside of the track for the use of passengers and the public, to make the children get off the track. While he was on such walk for this purpose, he heard a train approaching in his rear, and moved to the middle of the walk, where he would have been safe from being struck by any passing car of ordinary width. But the approaching train was a construction train of peculiar build, having its brakes attached to the sides of the cars instead of at the ends, and thus causing the brake wheels to project about fourteen inches beyond the edge of the car. This wheel being of the height of plaintiff's head, struck and injured him as the train passed. It is held that plaintiff had a right to be on the walk, and to suppose himself safe while there at a point beyond the projection of all ordinary trains.

Standing on Station Platform after Assisting Friends upon Train.—In Atchison, etc., R. Co. *v.* Johns, 36 Kan. 769, 14 Pac. 237, it appeared that an old lady went to a railroad station to assist friends who were moving from the country permanently to get upon a train

then about to depart, and after bidding her friends good-bye, and after they had gone upon the train, stood for about five minutes upon the station platform to see the train start and to bid her friends a last farewell. It was held that while so standing upon the platform she was not by reason thereof guilty of such contributory negligence as would prevent her from recovering for injuries sustained through the negligence of the railroad.

A. R. Y.

MOYSE *v.* NORTHERN PAC. RY. CO. *et al.*

(Supreme Court of Montana, May 3, 1910.)

[108 Pac. Rep. 1062.]

Master and Servant—Injury to Servant—Fellow Servants—Statutes.—Rev. Codes, § 5251, making every railroad company liable for damages to any employee, caused by negligence of any other employee, etc., abolishes the fellow servant rule without defining the relation of master and servant, but leaves it for the court to determine when the relation exists.

Master and Servant—Fellow Servants—Who Are.—The test of the applicability of the fellow servant doctrine to any given case is not whether the injury was received by the servant during working hours, or when he was at work after working hours, but whether, at the time of the injury, the servant was doing something which it was his duty or he had a right to do under the contract, and, if he was so acting, the doctrine applies.

Master and Servant—Injury to Servant—Scope of Employment.*—A freight conductor who was required to be within call, and who was expected to occupy the caboose of his train at night while awaiting the call to go on duty, and who had the right to do so as a privilege under his contract, and who so occupied it, was, while so occupying it, in the discharge of his duties, though his pay stopped on his registering on his arrival, and would not begin until he was called to make his return trip, and the railroad was bound to provide him a reasonably safe place and to maintain it in that condition.

Master and Servant—Injury to Servant—Negligence.†—A freight caboose, occupied by the conductor in the discharge of his duty, was placed on a yard track terminating at an excavation. The track graded sharply toward the excavation. There was no device to pre-

*See last foot-note of Thomas *v.* Wisconsin Cent. Ry. Co. (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

†See last foot-note of Dudley *v.* Illinois Cent. R. Co. (Ky.), 20 R. R. R. 844, 43 Am. & Eng. R. Cas., N. S., 844; McGinnis *v.* Chicago, etc., Ry. Co. (Mo.), 22 R. R. R. 715, 45 Am. & Eng. R. Cas., N. S., 715; Able *v.* Southern Ry. (S. Car.), 22 R. R. R. 115, 45 Am. & Eng. R. Cas., N. S., 115.

vent escaping cars from falling into the excavation. A yard crew while at work in making up his train placed cars on the track, but failed to properly secure them by brakes, and they moved toward the excavation, and caused the caboose to fall into it, injuring the conductor. Held, that the railroad and the yard foreman, whose duty it was to see that proper precautions were observed, were liable for the injuries received.

Master and Servant—Injury to Servant—Liability of Foreman of Employer.†—The foreman of a railroad yard, required to give the general direction of operations in the yard, is not responsible for an unguarded excavation at the end of a side track, because it was a primary duty of the railroad to take precautions with reference thereto.

Master and Servant—Injury to Servant—Liability of Foreman of Employer.—Where the foreman of a railroad yard, required to direct the movements of cars and observe the precautions attending the performance of that duty, was not actively on duty at the time of an accident, caused by failing to properly secure cars placed on an inclined side track, terminating at an excavation, he was not liable for injuries to a freight conductor occasioned thereby, either on the ground of personal neglect of duty or as an intermediate agent of the railroad.

Master and Servant—Injury to Servant—Negligence—Instructions.—Where, in an action against a railroad and its employees for injuries to a conductor, the complaint charged conjunctively the omission to guard an excavation at the termination of a side track in a railroad yard, and the manner of handling cars on such side track by the employees, and the jury found against all the defendants, instructions formulated on the theory that if the jury found fault in the first respect only, they should find against the company only, while if they found fault in the second respect, they should find against all defendants, were not erroneous, as authorizing a recovery on a showing of negligence in either respect.

Master and Servant—Injury to Servant—Fellow Servants—Statutes.—Rev. Codes, § 5251, making a railroad liable for injuries to any employee caused by the negligence of any other employee, etc., has no application to a charge of a violation by a railroad of a primary duty not within the scope of the employment of employees.

Negligence—Complaint—Evidence.—Though several acts of negligence are alleged in the complaint, proof of all is not required, and a recovery is sustained on any one or more of them.

Master and Servant—Injury to Servant—Issues, Proof, and Variance.—A complaint in an action for injuries to a conductor while occupying his caboose, standing on a side track in a railroad yard, which alleges that the railroad and its employees negligently permitted cars to be on the track without setting the brakes, and that they negligently drove the cars towards and against the caboose, is

†See foot-note on preceding page.

sustained by evidence that the cars escaped after they were left standing on the track, and ran against the caboose, and moved it so that it fell into an excavation at the end of the track.

Master and Servant—Injury to Servant—Assumption of Risk.‡—A freight conductor, occupying his caboose while on a side track in a railroad yard while the yard crew was engaged in making up his train, assumes the risks of dangers incident to the handling of cars under the circumstances known to him, but he does not assume the risk arising from the negligence of the yard crew in handling cars in the yards.

Damages—Personal Injuries—Instructions.—In an action for a personal injury, an instruction directing the jury to award plaintiff such sum on account of the reduction of his capacity to earn money by reason of his injuries as will purchase an annuity equal to the difference in the amount he could earn annually were it not for his injuries, keeping in mind any diminution in his earning capacity on account of advancing years or other causes, if the injury had not occurred, and an instruction that the annuity tables were not to be considered as an absolute basis for their calculations, but should be used by them only so far as the facts correspond to those from which the tables were computed, properly charged on the measure of damages for loss of earning capacity.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by E. E. Moyse against the Northern Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed as to two of the defendants, and reversed and remanded with directions to dismiss the action as to the third defendant.

Wm. Wallace, Jr., John G. Brown, and *R. F. Gaines,* for appellants.

Miller & O'Connor and *T. J. Walsh,* for respondent.

BRANTLY, C. J. Action by plaintiff for damages for personal injuries. On August 17, 1906, the plaintiff was in the employ of the defendant company as a conductor. The defendant Doyle was the yard foreman of the company, in charge of other employees in the actual discharge of his duties in directing the movement and disposition of cars in the yards of the company at Butte. Defendant Whalen was also in the employ of the company as foreman having general charge of the yards. At the time of the accident plaintiff was in a caboose of the company which stood on a side track in the yards. The main and side tracks extend east and west. To the west from the point

‡See first foot-note of Silvia *v.* New York, etc., R. Co. (Mass.), 34 R. R. R. 74, 57 Am. & Eng. R. Cas., N. S., 74.

where the caboose was standing, there was an excavation, about 22 feet in depth and 40 feet in width. The grade of the tracks inclined sharply to the west, so that a car left standing on any of them without having the brakes properly set would of its own weight move toward the excavation. The main line and one of the other tracks crossed the excavation upon a trestle, but the track upon which the caboose was standing ended at its brink. There was at this point no block or other device to prevent a car standing thereon, if it happened to escape, from being precipitated into the excavation. In addition to the foregoing facts it is alleged that the plaintiff was in the caboose in the discharge of his duties; that the defendant company and its foreman Whalen in the exercise of reasonable care could have known, and in fact did know, of the existence of the excavation and the facts stated above, but nevertheless failed to obstruct the said track, or to exercise reasonable or any care to prevent a car proceeding along it from falling into the excavation; that while the caboose was standing on the track the defendant company, through its employees Whalen and Doyle, being then engaged in the discharge of their duties, moved a train of cars upon and along the track toward the caboose and toward the excavation; that they negligently permitted these cars to be upon the track without setting the brakes sufficiently to prevent them from descending by their own weight at a dangerous rate of speed toward and against the caboose, and that they negligently drove the cars against the caboose where the plaintiff then was, with great violence, disconnecting the brakes thereon, and driving it along the track and into the excavation, whereby plaintiff was injured. The answer of the company admits that plaintiff sustained certain injuries while in the caboose, but denies that he was at the time in the discharge of his duties as employee of the company. It alleges affirmatively that he was guilty of contributory negligence and that he assumed the risk. The separate answer of defendants Whalen and Doyle interposes the same defenses. As to the affirmative defenses there is issue by reply.

The evidence discloses the following: Plaintiff was at the time of his injury 41 years of age; he was in good health, and had been in railway service for 17 years, during the last 4 of which he had been a conductor on the Montana division of the defendant company's railroad. He resided with his family at Livingston. He ran freight trains from Livingston to Helena, Butte, and Billings. On August 16th he brought train No. 56 from Livingston, arriving at Butte at 11:45 p. m. On reaching the yards he "registered in;" that is, he delivered his waybills at the telegraph office of the company, and signed the register after noting the time of his arrival, etc. Upon registering in his pay ceased until he was "called" to make his return

trip. It began again 30 minutes before the hour stated for departure in the call. The brakemen were also off active duty as soon as they had set the hand brakes on the cars and had disconnected the engine. From that time the train, including the caboose, was in charge of the yard crew. By "yard crew" is meant the foreman in charge and his assistants. The term "called" means that, when the train is ready to leave, the call boy tells the crew to get ready to take charge of the train, and informs them of the time of starting. It is customary for a train crew, when away from home terminals, to sleep in their caboose. It is provided with a "bunk" under the cupola, which is occupied by the conductor, and a "bunk" in the body of the car, fitted up with cushions, which the brakemen occupy. The cushions serve for mattresses. . All the members of a crew furnish their necessary bed clothes. This custom had been observed by train crews for 17 years. After the yard crew takes charge of a train they place the caboose at any convenient place in the yard selected by the foreman, unless there is a siding especially designated for it. There was no such siding in the Butte yards. After the train crew had retired to the caboose on the night of the 16th, but while they were still awake, the yard crew took the train away and switched the caboose over to the track upon which it stood at the time of the accident. This is designated by the witnesses as track No. 4, to the north. On the morning of the 17th the plaintiff was informed at the telegraph office that his train would not be ready to leave until early in the morning of the 18th. He and the rest of the crew, two brakeman, spent the day in the city, returning to the caboose about 5 o'clock. At that time an empty gondola car was standing on the track, 5 or 6 car lengths east of the caboose. The latter was standing about 12 car lengths east from the excavation. A car length is about 36 feet. The excavation had been made by the Butte Electric Street Railway Company through the yards of the defendant company, to provide a crossing for the electric cars under the tracks of the railroad, the intention being to erect a trestle viaduct for all the tracks of the latter. Prior to the beginning of his work the tracks had rested on a solid embankment. The viaduct had been completed in part, but was not of sufficient width to accommodate all the tracks of the railroad company. As already stated, some of them, including the one occupied by the caboose, ended at the brink of the excavation. A week before the 16th, on a prior trip to Butte, the plaintiff had noticed the excavation, and that men were at work in the construction of the viaduct. The telegraph office of the company was some 50 feet west of the excavation, and upon going to the office to register in, on the evening of the 16th, the plaintiff must have passed over the excavation on the completed portion of the viaduct, or have

gone around it upon the public road. He must also have pursued one or the other of these courses in order to reach the office on the morning of the 17th, when he went to inquire as to the hour when his train would leave. On the evening of the 17th the crew went to bed in the caboose, about 7 o'clock. At that time the caboose and the gondola were standing as in the morning, held by the hand brakes. The brakes hold cars so placed if they are set securely and are not disturbed by impact by other cars. The yard crews were to make up two trains that night, one of which was No. 56. About 7:45 two other cars were put upon track No. 4, to the east of the gondola and against it. One was a gondola and the other a flat car loaded with steel. They were left standing, held by the hand brakes only. About 9:45 four other cars, loaded with copper, were pushed upon the track from the east by the yard crew and put against the car loaded with steel. The cars thus set together were automatically coupled and were left standing, apparently held securely by the brakes. The yard crew then went to secure other cars. Upon their return a few minutes later all the cars left by them, including the empty gondola and the caboose, had disappeared. The six cars which had been coupled together had in some manner been released and gotten under way, and, colliding with the gondola and caboose, had driven them to the excavation, with the result that the west end of the caboose was precipitated into it. The plaintiff was awakened by the impact, but, supposing that it was produced by the crew in making up his train—hard bumps of that character being not unusual—he did not give it serious attention until the car began to gather speed. He then called to the brakemen and attempted to escape, but was too late. He reached the platform as the car began to descend into the excavation, and as he held on by the hand bars he was struck by something upon the hip, receiving the injury of which he complains. Whalen was the immediate superior of Doyle. Trains were moved and cars were placed according to Whalen's directions. Whalen usually went off active duty at 7 o'clock in the evening. At the time of the accident he was at his home, having gone off duty at the usual time. The rules of the company contained the following:

"Rule 13. Employees of the company must devote themselves to its service, attending during the prescribed hours of the day or night, and residing wherever required.

"Rule 14. No employee will be allowed to absent himself from duty without permission from the head of the department in which employed."

"Rule 16. Yardmasters report to the trainmaster, assistant superintendent, or superintendent; perform work ordered by agents; and are in charge of yard work, yard engines and crews, and trains and engines while in yards."

Unless a member of a train crew was laid off, or was absent by permission, he was, under rules 13 and 14, required to be within call at all times and ready for duty. So the plaintiff interpreted these rules and it is not questioned that his view of their meaning was correct. The plaintiff had verdict and judgment. The defendants have appealed from the judgment and an order denying their motion for a new trial.

The complaint is framed upon the theory that the defendant company is liable to the plaintiff, as one of its employees, for injuries received while engaged in the discharge of his duties, through the negligence of other employees, and that the other defendants are liable because they were personally guilty of the acts of negligence which caused the injury. It declares upon the statute which abolishes the fellow servant rule. Rev. Codes, § 5251. The acts charged as negligence are the handling of the cars by the yard crew in making up the train in such manner as to permit them to escape and collide with the caboose, driving it into the excavation, and the omission by defendants to provide some device, at the brink of the excavation, to prevent the caboose from being precipitated therein, if from any cause it escaped.

The first contention made by counsel is that the evidence is insufficient to justify the verdict, for that it appears that at the time the plaintiff was injured he was not engaged actively in the discharge of duties for which he was employed by the company, but was a mere licensee upon its property, to whom it and its employees owed no duty other than to refrain from doing him a willful or wanton injury; and hence that no liability can be predicated upon the statute. In support of this contention counsel argue that, while one is in the employ of another under a contract, he is, in a popular sense, an employee during the entire period covered by the contract; yet the rights and duties incident to the relation of master and servant, in a legal sense, do not subsist, except during the time which, under his contract, he must actively devote to the duties of his employment. To make the statement in another way: Unless the servant is at a particular time under the control of the master, giving his time and attention to the particular duties he is employed to do, he is pro hac vice a stranger, to whom the master, as such, owes no duty whatever, except such as he must observe toward any other stranger under the social compact.

While the statute has to do exclusively with those persons who sustain toward each other the relation of master and servant, it does not undertake to define who those persons are, but merely imposes certain rights and liabilities upon them, leaving it to the courts to determine when persons have assumed the relation. Dresser's Employer's Liability, § 8. It is not always easy to determine exactly when the relationship, once established,

ceases, and the servant may be said for the time being to be his own master. In Northwestern Packett Co. *v.* McCue, 17 Wall. 508, 21 L. Ed. 705, the question arose upon the evidence as to whether the employment of the deceased had ended at the time he received the injury. The court said: "It was for the jury to say from the nature of the employment, the manner of engaging hands, the usual modes of transacting such business, and the other circumstances of the case, whether the service had or had not ended at the time of the accident." On this subject Mr. Dresser says: "If a general rule were to be laid down, it might perhaps be that the employment begins when the servant enters premises or trains in the control of his master, for the purpose of reaching the particular place where he is to work. The length of time before or after the hour for beginning work is not a guide." Dresser, Employer's Liability, § 13.

The facts and circumstances which appear from the statement of the evidence before us furnish support for the inference that, during the entire time when the plaintiff was away from his home terminal, he was, except when notified that his services were not wanted, subject to be called on duty. He was required to be within call, and, as he understood the rules, was subject to discipline if he was not. It was also a fair inference that though he was not under his contract required to occupy the caboose at night, he was nevertheless expected to do so, and not only this, but that he had a right to do so, because it was under all the circumstances a substantial privilege accorded to him under the contract, which the company was not at liberty to withdraw at will. If these inferences are permissible, and we think they are, then the conclusion seems inevitable that he was in the caboose in the course of his employment, and that the members of the yard crew were his fellow servants, for whose negligence the company is liable under the statute. The cases differ greatly as to whether, under such circumstances as are presented in this case, the relationship of master and servant subsists, and whether or not the servant is entitled to all the benefits of such relationship. As is said in the note to Taylor *v.* Bush & Sons Co., 12 L. R. A. (N. S.) 853, they arise in a variety of circumstances. Some of them involve the fellow servant doctrine, others the assumption of risks, and still others involve consideration of the question whether the master has used ordinary care to furnish a reasonably safe place for the servant to be while at work. In all the cases, however, the essential question to be determined is: Did the relationship of the master and servant actually exist at the time of the injury?

In St. Louis, A. & T. Ry. Co. *v.* Welch, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839, the plaintiff was the foreman of a bridge gang in the employment of the defendant. At the time of the

accident he was asleep in a car provided by the company for that purpose, which was lying upon a side track. Other employees of the defendant, in operating one of its freight trains, negligently ran it upon the side track, and struck the car in which the plaintiff was with such violence that plaintiff was seriously injured. The court, after sustaining the contention made by the defendant that the plaintiff was a fellow servant of the employees operating the train, said: "The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his [their?] services."

In International & G. N. R. Co. *v.* Ryan, 82 Tex. 565, 18 S. W. 219, the plaintiff was employed by the railway company by the day as a carpenter. He was on a car of the defendant on his way, with other members of the working crew to which he belonged, from the station where the crew had been at work, to another where similar work was to be done. They had orders to stop in the yards at San Antonio, an intermediate station, to do some repair work. The car was standing on a side track in the yards. The plaintiff, having spent a portion of the evening in the city, had returned to the car, and was engaged in writing a letter. Another employee, in charge of a switch engine, negligently ran it into the car and seriously injured him. The court held that the plaintiff and the employees in charge of the switch engine were fellow servants. It disposed of the contention that he was not in the employ of the defendant, by saying: "In this case we think it is evident from the facts testified to by the appellee that he was, in contemplation of law, in the employment of the company at the time of the collision. His presence in the car on the side track at the time of the collision can be explained in no other way, under the proof. It was only by reason of the fact that he was an employee of the company that he was in the car on the side track at the time he was injured."

In Dishon *v.* Cincinnati, N. O. & T. Ry. Co. (C. C.) 126 Fed 194, the court discussed somewhat at length the reason which furnishes the basis of the fellow servant rule, and reviewed exhaustively the cases in which it has been invoked and applied in order to relieve the master from liability. The facts in the case show that deceased was in the employ of the defendant as

a section hand. He boarded with the section boss at the company's section house. On the evening of the accident after he had finished his work and eaten his supper, he started with two others to go to the railway station on the opposite side of the track. There was an opening between cars standing on a side track which he had to cross. He had passed through this on his way from work. He and his companions undertook to pass between the cars. One of them passed through in safety; the deceased then attempted to pass through, but while he was making the attempt, the opening was closed by the cars being shoved back by an engine manipulating the cars on the track. The result was that he was crushed and killed. The court held that the death of the deceased was caused by the negligence of his fellow servants, a risk which he assumed when he entered the employment of the defendant. Touching the question involved here it is said: "There is no good reason for holding that the assumption of risk exists when the servant is doing one thing required of him by the contract, and does not exist when he is doing another thing so required, or that it exists when he is doing a thing required of him by the contract, and does not exist when he is doing a thing which he is simply authorized to do by the contract. Any stopping short, therefore, of making the assumption by the servant of the current risks of his employment as wide as the action on his part contemplated by the contract discredits the principle and reasoning on which the fellow servant doctrine is based and that doctrine itself. Hence it is never a test of the application of the fellow servant doctrine to any given case, whether or not the injury was received by the servant during working hours or when he was at work after working hours. The sole test of its application thereto is whether at the time of the injury the servant was doing something which it was his duty or he had a right to do under the contract. If he was so acting, the doctrine applies; if not, it does not apply." This case was subsequently reviewed by the Circuit Court of Appeals. 133 Fed. 471, 66 C. C. A. 345. The judgment was affirmed on the ground that it appeared that the deceased was guilty of contributory negligence in attempting to pass between the cars as he did. The appellate court intimated that, in view of its decision in the case of Ellsworth v. Metheny, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, the conclusion of the Circuit Court that the deceased was still in the course of his employment was erroneous. It did not, however, question the soundness of the rule announced by the Circuit Court as to the test by which the question when the relation of master and servant ceases must be determined. It may be admitted that the conclusion of the Circuit Court that the deceased was acting within the scope of his duty when injured was erroneous. We are inclined to think it was. Nevertheless, the

rule, as stated, is, in our opinion, a just one, and is fully sustained by the great number of cases cited and examined. Even the briefest notice of these cases would extend this opinion beyond any reasonable limit. We content ourselves by reference to the opinion itself, and to the note to Taylor *v.* Bush & Sons Co., supra, wherein will be found a great number of cases illustrating the conflicting views of the courts. It may be observed of the case of Ellsworth *v.* Metheny that while the appellate court held that the deceased was not at the time of his death in the discharge of the duties of his employment, and hence was not entitled to recover on the theory that he was a servant of the defendant, it held that the case should have been submitted to the jury upon the question whether the defendant had been guilty of negligence in installing a dangerous apparatus in a place where his employees had a right to be as licensees by his implied consent, without properly guarding it. The apparatus consisted of a highly charged electric wire strung on brackets along the wall of a dark entry in a mine in which the deceased was working. The entry was not in the part of the mine where deceased was at work, but the men, with the knowledge of defendant, were accustomed to use it when they came from their rooms during refreshment and rest at the noon hour. The deceased had passed through it to the room of a fellow workman. On his return he came in contact with the wire and was killed. We have referred to this case because counsel for defendants have cited it in support of their contention, and also because of the further contention made by them that the plaintiff was in the caboose as a mere licensee.

The conclusion we have reached, that the plaintiff was in the caboose for the purpose of being within call by the defendant company to go on duty, and was therefore in the discharge of his duties, involves the conclusion, also, that he was not there as a mere licensee, and that the rule of liability declared by the statute applies to the case made by the evidence. It is not at all conclusive that the pay of the plaintiff ceased when he registered in on his arrival at Butte. In the light of the evidence, under the contract of employment it was within the contemplation of both parties that he should hold himself subject to the order of the company after his pay had ceased; and it seems clear that a contract including a stipulation of this kind, express or implied, is not open to any legal objection.

Under the circumstances disclosed, the obligation was upon the company to use ordinary care to provide a reasonably safe place for the use of plaintiff, and to maintain it in that condition. The evidence furnishes ample support for the conclusion that it failed to discharge its obligation in this regard; for, though it may be conceded for present purposes, that it was not required to provide a block or other device to prevent escaping cars from

falling into the excavation and that the yards were otherwise in a reasonably safe condition, it was nevertheless bound to see that the yard crew took ordinary precaution to maintain this condition, and not to allow cars to escape and collide with the caboose so as to expose the plaintiff to additional peril. The evidence tends to show that but for the escape of the loaded cars, which the ordinary precaution of securely setting the brakes would have prevented, the accident would not have occurred. For this lapse of duty the defendant company is liable, as is also the defendant Doyle; for, for the time being, he stood in the place of the company, and it was his personal duty to see that the proper precautions were observed. But we are of the opinion that a separate motion for nonsuit, made on behalf of Whalen, should have been sustained. It is true that he was foreman of the yards and had general direction of the operations there, as the immediate superior of Doyle. Yet he was off duty at his home at the time of the accident. He was not, under the evidence, responsible for the unguarded condition of the excavation. It was a primary duty of the company to take precaution with reference to it; and under the rule he was not required to do anything further than to direct the movement of cars and observe the precautions attending the performance of that duty. And since he was not actively on duty in this regard at the time of the accident, he cannot be held either for personal neglect of duty, nor as an intermediate agent of the company.

Contention is made that the charge of the court was erroneous in that, while two acts of negligence are charged conjunctively, in the complaint, to wit, the omission to guard the excavation, and the negligence of the employees in handling the cars, it instructed the jury that plaintiff could recover upon a showing of fault in either respect. This point was not made in the trial court; but, even so, the defendants cannot complain. Let it be conceded that two separate causes of action are stated. The instructions were formulated upon the theory that if the jury found fault in the first respect only, they should find against the company only; but if they found fault in the second respect, they should find against all of the defendants. Since the finding was against all of the defendants, we presume that they found negligence in the handling of cars. Viewed in its first aspect, the complaint charges the violation of a primary duty only, which did not fall within the scope of the employment of the yard crew, as we have already pointed out in determining the liability of Whalen. To this aspect of the case the statute has no application, because the fault was not that of a fellow servant of plaintiff. In its second aspect the case falls under the statute. Advantage of this fault, if it be such, should have been taken by special demurrer. It is not a valid objection to the

judgment, so far as concerns the company, that the jury were permitted to find upon either view of the case. Although several acts of negligence are alleged in the complaint, proof of all is not required. A recovery will be sustained upon proof of any one or more of them. 14 Ency. Pl. & Pr. 345; 29 Cyc. 587; Hoskins *v.* Northern Pacific Ry. Co., 39 Mont. 394, 102 Pac. 988. Upon the evidence the jury may or may not have concluded that the company was negligent in omitting to block the track. Whether it did or not is not material. Their finding that there was negligence in the handling of cars is sufficient to sustain the verdict.

A similar contention is made with reference to the allegations that the defendants negligently permitted the cars to be upon the track without setting the brakes, and that they negligently drove the cars toward and against the caboose. The contention is really based upon a technical objection to the form of the statement in the complaint. The evidence tends to show that the cars escaped after they were left standing on the track. This sustains the allegation from any point of view. If the defendants left the cars in such an insecure condition that they escaped and collided with the caboose, the result was that they negligently drove them and thus caused the collision. They put the effective cause of the accident in motion. It was one and the same cause whether the cars moved of their own weight or were moved by an engine.

It is said that the plaintiff knew and understood the danger of the situation, and therefore, by going to sleep in the caboose, he assumed the risk. There is no merit in this contention. That the place was not safe is apparent. He assumed the risk of all dangers ordinarily incident to the handling of cars under the circumstances as he saw them. Among these was a likelihood of injury due to the bumping of cars against the caboose during the making up of a train; but he had no cause to think when he went into the caboose that the yard crew would omit to observe ordinary precautions to secure the cars by means of the brakes, and thus add to the perils which he did assume. He was entitled to assume, looking to all of the conditions as they actually were, that the place was reasonably safe. It was not apparent to him, nor was he bound to know, that the yard crew were going to be so negligent in the course of their employment that he would certainly be injured if he remained in the caboose. The true test to be applied is not whether the injured servant exercised reasonable care to discover the dangers, but whether the danger was known or plainly observable. Choctaw *v.* McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; McCabe *v.* Montana Central Ry. Co., 30 Mont. 323, 76 Pac. 701; Anderson *v.* Northern Pacific Ry. Co., 34 Mont. 181, 85 Pac. 884. The evidence fairly presented a case for the jury on this point.

Fault is found with the charge of the court in many particulars. We have given our attention to them, but find no prejudicial error in any of them. Nor do we find that the court omitted any instruction which it should have given. Most of counsel's criticisms are predicated upon the assumption that the theory of the case adopted by the trial court, as to the liability of the defendants upon any aspect of it, was erroneous. What has been said in the discussion of the principal contention disposes of all of these criticisms.

As to the measure of damages, the court gave, among others, the following instruction: "If you find for the plaintiff, and should further find that the capacity of the plaintiff to labor or earn money has been reduced by reason of his injuries, you should award him such sum on that account as will purchase an annuity equal to the difference in the amount he could earn annually in view of his injuries and the amount he could have earned annually were it not for his injuries, keeping in mind, however, any diminution in his earning capacity that may ensue on account of his advancing years or from other causes if the injury had not occurred." It is said that the jury were here told that, having determined the yearly loss of earnings by plaintiff by reason of his impaired capacity, the cost of an annuity for a like amount was the standard by which they should measure the amount of their verdict. As an abstract statement of law there is no fault to be found with the instruction. What it would cost to buy an annuity for the amount which a person in the condition in which plaintiff appeared to the jury to be at the time of the trial, is as nearly an exact standard as can be laid down. Of course, in ascertaining the amount of the annuity, the jury must take into consideration probable diminution of earning capacity due to causes other than the injury itself, such as advancing age, the apparent present state of plaintiff's health, the apparent permanence or lack of permanence of his disability, his habits of life, and the possibility that his employment would have been continuous, and the like. These are the conditions referred to in the latter part of the instruction, and, if any fault is to be found with it, it lies in the fact that these conditions are not enumerated with more particularity. In a later instruction, however, given at the request of the defendants, after referring to the evidence touching the use they might make of mortality and annuity tables, the court carefully called the attention of the jury to these particular conditions, saying to them that these tables were not to be considered as an absolute basis for their calculations, but must be used by them as a guide only so far as the facts before corresponded to those from which the tables were computed. This brings the instructions within the rule as laid down in Bourke *v.* Butte Electric Ry. Co., 33 Mont. 267, 83 Pac. 470, as explained in

Lewis *v.* Northern Pacific Ry. Co., 36 Mont. 225, 92 Pac. 469, and Robinson *v.* Helena Light & Ry. Co., 38 Mont. 222, 99 Pac. 837.

Other alleged errors have been examined, but none of them have been found sufficiently meritorious to require special notice.

The judgment and order are affirmed as to the defendants railway company and Doyle; as to the defendant Whalen they are reversed, and the cause is remanded, with directions to the district court to dismiss the action as to him.

SMITH and HOLLOWAY, JJ., concur.

EMERSON *v.* BOSTON & M. R. R. *et al.*

(Supreme Court of New Hampshire, Merrimack, Feb. 1, 1910.)

[75 Atl. Rep. 529.]

Statutes—Legislative Language—Construction.—Legislative language is not given a strict or literal meaning, when it is apparent from competent evidence that such meaning was not intended by the lawmakers.

Carriers—Passes—Lease—Construction.—Where the lessee of a railroad agreed by the lease "to transport the stockholders of the lessor to and from their annual and special meetings free of charge," and at the time of the lease it was not prohibited by law or contrary to public policy, it became a binding part of the contract; and, though the lessee agreed to carry the stockholders "free of charge," it did not undertake to do so as a pure gratuity, but for a sufficient consideration it agreed to carry them without the usual charge exacted of ordinary passengers.

Carriers—Passes—Laws Prohibiting—Retroactive Effect of Statute.—Laws 1909, c. 126, § 2, provides that no carrier shall give any free ticket, pass, or transportation for passengers between points within the state except to certain specified persons. Section 6 authorized the imposition of fines for violation of the act. Defendant leased a railroad, agreeing in the lease to transport stockholders of the lessor to and from their annual and special meetings "free of charge." Plaintiff, a stockholder of the lessor, applied for transportation and was refused. Held, that the issuance of the pass would not be a violation of chapter 126, since it cannot be presumed that the Legislature intended the act to have a retrospective effect, rendering former valid contracts illegal and void.

Young, J., dissenting.

Exceptions from Superior Court, Merrimack County; Stone, Judge.

Emerson *v.* Boston & M. R. R

Suit by Henry A. Emerson against the Boston & Maine Railroad and another. From a decree dismissing the bill, plaintiff excepts. Exceptions sustained.

The plaintiff is a stockholder in the Concord & Montreal Railroad, one of the defendants, which railroad was leased in 1895 to the Boston & Maine Railroad. By one of the provisions of the lease the lessees agreed to transport the stockholders of the lessors to and from the latter's annual and special meetings free of charge. The plaintiff, desiring to attend an annual meeting of his company, has demanded of the lessee transportation in accordance with the terms of the lease, which was refused on the ground that compliance would be a violation of chapter 126, Laws 1909. The prayer of the bill is that the lessee be ordered to furnish the plaintiff the transportation demanded.

Martin & Howe, for plaintiff.
John M. Mitchell, for defendants.

WALKER, J. The question presented by the plaintiff's exception to the ruling dismissing the bill is whether the provision in the lease of the Concord & Montreal Railroad to the Boston & Maine Railroad, which provides that "the lessee * * * shall transport the stockholders of the lessor to and from their annual and special meetings free of charge," has been invalidated by chapter 126, Laws 1909, entitled "An act to prohibit free transportation of passengers by carriers." Section 2 of that act provides that "no carrier shall, directly or indirectly, issue or give any free ticket, free pass, or free transportation for passengers between points within this state, except to" certain specified classes of persons, which do not include a stockholder of a leased road, like the plaintiff. Section 6 authorizes the imposition of fines for violation of the act. The controlling purpose of the Legislature in the passage of this act was to prevent the continuance of what was deemed to the pernicious practice of railroad corporations in gratuitously issuing passes to passengers over their lines, whose friendly influence for political or other purposes might thus be secured to the detriment of the public good. This was the principal mischief which it was sought to correct, and which must be borne in mind in any attempt to judicially construe the statute. Legislative language is not given a strict or literal meaning, when it is apparent from competent evidence that such meaning was not intended by the lawmakers. "The evil at which the statute was aimed is evidence of its meaning (Co. Lit. 381, b; 1 Bl. Com. 87), and may be looked for in the public history of the time (Aldridge *v.* Williams, 3 How. 9, 24, 11 L. Ed. 469; United States *v.* Railroad, 91 U. S. 72, 79 [23 L. Ed. 224]; Rich *v.* Flanders, 39 N. H. 304, 311, 312)." Opinion of the Justices, 66 N. H. 629, 660, 33 Atl. 1076; Pierce *v.* Emery, 32 N. H. 484, 508.

The statute in question prohibits free transportation of passengers by railroads, with certain exceptions not germane to the present inquiry. Does the plaintiff seek "free transportation" for himself, in the sense in which that expression is used in the statute? His claim is based, not upon a gratuitous favor which he asks the railroad to accord to him, and which for obvious reasons the railroad is under no legal obligation to grant, but upon a contractual obligation entered into by the defendants, which, if valid and binding at the present time, establishes his stockholder's right to be transported to and from the corporate meetings of the Concord & Montreal Railroad. In effect, his contention is that his right to such transportation has been bought and paid for, and that he is not asking the defendants to make a new contract or agreement to transport him without pecuniary compensation, but to perform an old contract which has been in force for many years. By the lease the Boston & Maine Railroad agreed with the lessor corporation to "transport the stockholders of the lessor to and from their annual and special meetings free of charge." This was one of the essential parts of the contract. It constituted one of the considerations for the execution of the lease; and, as it was not at that time prohibited by law or contrary to public policy, it became a binding part of the contract. It is not inaccurate or misleading, as a legal proposition, to say that the lessee was paid for furnishing the transportation in question. In this view of the case, the lessee is merely asked in this proceeding to perform its contract. Although it agreed to carry stockholders "free of charge," the meaning is, not that it assumed to do that as a pure gratuity, but that for a sufficient consideration it agreed to carry them without the usual and additional compensation exacted of ordinary passengers. The terms of the lease admit of no other sensible construction upon this point.

As the stockholders of the Concord road authorized and ratified the lease, and were in effect the actual lessors, and became entitled as such stockholders to the transportation provided for them in the lease, the issuance of a stockholder's pass to the plaintiff for the purpose of attending the annual meeting of the Concord & Montreal corporation is not a violation of the provisions of chapter 126, Laws 1909. It cannot be presumed that the Legislature intended the act to have a retrospective effect, rendering former valid contracts illegal and void. This result is supported by analogous cases in other jurisdictions. Dempsey *v.* Railroad, 146 N. Y. 290, 40 N. E. 867; Louisville, etc., R. R. *v.* Mottley (Ky.) 118 S. W. 982, s. c. (C. C.) 150 Fed. 406; Curry *v.* Railway, 58 Kan. 6, 18, 48 Pac. 579; Oklahoma City *v.* Railway, 20 Okl. 1, 93 Pac. 48, 16 L. R. A. (N. S.) 651.

Exception sustained.

YOUNG, J., doubted. The others concurred.

MARTIN *v.* BOSTON & N. ST. R. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 23, 1910.)

[91 N. E. Rep. 159.]

Negligence—"Gross Negligence."*—Negligence, to be "gross," must include an element of carelessness so great that the court or jury can say that there was not only an absence of the due care that should have been exercised, but also a great degree of negligence materially greater than that which would constitute ordinary negligence.

Carriers—Gross Negligence—Res Ipsa Loquitur.—That an explosion occurs in the controller box of a street car, which, up to the time of the explosion, was running smoothly, is not, under the doctrine of res ipsa loquitur, a showing of gross negligence on the part of the operatives of the car.

Appeal and Error—Review—Qualification of Expert Witness.—While it is a general rule that the question whether a witness is qualified as an expert is for the trial court, nevertheless, when the facts on which the decision of the question depends are undisputed, the question becomes one of law, and the decision of the trial court may be reviewed.

Evidence—Competency of Expert—Use of Adversary's Witness.—That a witness is not offered as an expert by the party calling him will not prevent the other side from using him as such, if it turns out that he has the necessary qualifications.

Evidence—Expert Witness—Evidence of Qualifications.—In an action for injuries to a street car passenger, evidence held to show no abuse of discretion in refusing, on cross-examination, to allow a witness to express his opinion as an expert.

Exceptions from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by one Martin, administrator, against the Boston & Northern Street Railroad Company. Verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

J. E. Cotter and *J. P. Fagan,* for plaintiff.
H. F. Hurlburt and *D. E. Hall,* for defendant.

MORTON, J. The declaration as amended was in four counts. The third count was a statutory count for the death of the plaintiff's intestate "by reason of the negligence and carelessness of the defendant and the unfitness and gross carelessness of its servants and agents while engaged in its business;" and

*For definitions of gross negligence, see last foot-note of Louisville & N. R. Co. *v.* Roth (Ky.), 32 R. R. R. 610, 55 Am. & Eng. R. Cas., N. S., 610.

the fourth count was at common law for conscious suffering caused by the negligence and carlessness of the defendant and its agents and servants. The plaintiff put in his case and rested. When he rested counsel for the plaintiff stated to the court that he relied on the third and fourth counts only and that he waived the first and second. In reply to a question by the court the plaintiff conceded that up to that point there was no evidence of the unfitness of the servants and agents of the defendant. Thereupon the defendant rested as to the gross negligence and carelessness of the defendant's agents and servants as alleged in the statutory count. The court then ruled that there was no evidence of the gross negligence or carelessness, or of the unfitness of the defendant's servants and agents, and declined to submit the case to the jury on those issues and limited the plaintiff under the third count to the questions of the negligence of the corporation itself. The plaintiff duly excepted, and the first question relates to the correctness of the rulings thus made.

The plaintiff relies on the doctrine of res ipsa loquitur, as applied to the circumstances of this case, to show that there was evidence warranting a finding that the accident was due to gross negligence on the part of the defendant's servants and agents. An accident may no doubt happen under circumstances which in the absence of any explanation, without anything more, would warrant a finding that it could not have occurred except for gross negligence and carelessness on the part of the defendant's servants or agents. See McNamara *v.* Boston & Maine Railroad, 202 Mass. 491, 89 N. E. 131. But negligence to be gross must include an element of carelessness so great that the court or jury can say that there was not only an absence of the due care that should have been exercised, but also a great degree of negligence materially greater than that which would constitute ordinary negligence. No doubt what would be gross negligence under one set of circumstances might not be so under another; and no doubt, also, the highly dangerous consequences to be apprehended in one case might contribute to render that gross negligence which would not be such in another case. In the present case the plaintiff introduced no independent evidence to show that there was anything defective or improper in the construction or operation of the car. On the contrary the uncontradicted testimony of the plaintiff's witnesses was that down to the instant of the explosion the car had been running smoothly and that it had stopped and started in the ordinary way, and that there had been nothing unusual about it. Under such circumstances it cannot be said that the explosion of itself furnished evidence of such conduct on the part of the defendant's servants and agents as to constitute gross negligence. The plaintiff has not argued that there was any evidence of the unfitness of the defendant's servants or agents. We think that the rulings excepted to were correct.

The plaintiff also excepted to certain rulings in regard to matters of evidence. The defendant called as a witness one Campbell, who testified that he was foreman of the electrical equipment of the defendant during a period which covered the time of the accident; and after stating what his duties were he went on to describe the construction and operation of the cars used by the defendant. He also testified that he examined the car in question on the night of the accident, and after describing certain tests that he made in regard to the controller and the result of them, he was permitted to answer without objection that the conclusion to which they led him was that the controller was "O. K." He further testified as to the condition in which he found other parts of the mechanism, and what he did in the way of causing repairs to be made. On cross-examination the plaintiff sought to use him as an expert, and for that purpose, after the witness had testified that the insulation was scorched on some of the wires, asked him, assuming that the insulation was worn off, what effect that would have upon the use and operation of the controller. This was objected to and excluded on the ground that the witness had not been put on as an expert. After some further questions and answers in regard to the principles and operation and results in certain cases of electric power, which were evidently put to bring out the knowledge of the witness in regard to such matters, the witness was asked, "Now, from your study of this case and from your familiarity with the principle of the resistance box, did you form any opinion as to when that was burned out or blown out?" And again, "Did you form an opinion as to what was the cause of the burning of the panel?" Upon objection both questions were excluded, the court stating in substance, later, that anything in the nature of facts could be shown by the witness, but anything in the nature of an opinion was excluded. It is no doubt true, as contended by the plaintiff, that while the general rule is that the question whether a witness is qualified as an expert is for the trial court, nevertheless when the facts upon which the decision of the question depends are undisputed the question becomes one of law, and the decision of the trial court may be reviewed. Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61. It is also no doubt true that the fact that a witness is not offered as an expert by the party calling him will not prevent the other side from using him as such if it turns out that he has the necessary qualifications. In the present case, while the witness showed great practical familiarity with the equipment and operation of electric cars, and might well have been allowed to express his opinion, we do not think that the facts in regard to his qualifications were so clear and undisputed that it can be said as matter of law that the court was wrong in

excluding the questions which it did. We do not understand that any ruling was asked for or any exception saved in regard to the witness' testimony at the former trial.

Exceptions overruled.

BLACK *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, May 18, 1910.)

[91 N. E. Rep. 891.]

Carriers—Injuries to Passenger—Sudden Stopping of Car.—That plaintiff testified that the street car on which she was riding was stopped more suddenly than any on which she had ever ridden, and that she had ridden on electric cars for a long time, showed that the stop was not one of the kind incident to travel on an electric car.

Carriers—Injuries to Passenger—Sufficiency of Evidence.—In an action for injuries to a passenger from the sudden stopping of a street car, plaintiff's testimony that she did not remember distinctly, but it seemed to her it was a regular stop, and that she had an indistinct recollection of some one passing in front of her as though they went out of the front door, justified a finding that the car was stopped to let off passengers, and not to avoid a collision.

Exceptions from Superior Court, Middlesex County; Lloyd E. White, Judge.

Action by Emma Black against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Coakley & Sherman, R. H. Sherman, and *W. M. Hurd,* for plaintiff.

F. W. Fosdick and *E. A. Counihan, Jr.,* for defendant.

LORING, J. The plaintiff testified that she was standing up with her hand through the loop of "the strap," and her thumb on the outside; that she had hold of the strap "firmly," and that "the strap was wrenched right out of my hand" by the car's stopping "very suddenly," more suddenly than she ever had seen a car stop, although she had been in the habit of riding on electric cars "for a long while" before the accident. She also testified that "a number of other people" standing in the car near her were thrown forward and back again by the sudden stop. This evidence, if believed, showed that the stop here in question was not of the kind incident to travel on an electric car, and the case comes within Lacour *v.* Springfield Street Railway, 200 Mass. 34, 85 N. E. 868, and Cutts *v.* Boston Elevated Rail-

way, 202 Mass. 450, 89 N. E. 21, and not within McGann *v.* Boston Elevated Railway, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509, and Stevens *v.* Boston Elevated Railway, 199 Mass. 472, 85 N. E. 571.

This has not been seriously questioned by the defendant. The contention put forward by it is that in a case like that now before us a plaintiff does not go far enough with his proof to make out a prima facie case of negligence in the stopping of the car unless he goes farther and introduces evidence to show that the sudden stop was not made to avoid a collision; and it relies on what was said by Lathrop, J., in Timms *v.* Old Colony St. Ry., 183 Mass. 193, 66 N. E. 797, in support of this contention. But that point was not decided in Timms *v.* Old Colony Street Ry. The stop there in question was of the kind which is incident to travel on electric cars. See, in this connection, Magee *v.* New York, New Haven & Hartford R. R., 195 Mass. 111, 113, 80 N. E. 689; Partelow *v.* Newton & Boston St. Ry., 196 Mass. 24, 31, 81 N. E. 894; McGann *v.* Boston Elevated Ry., 199 Mass. 446, 448, 449, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509; Stevens *v.* Boston Elevated Ry., 199 Mass. 471, 475, 85 N. E. 571.

It is not necessary to decide the point in the case at bar. In the case at bar the plaintiff did go farther. She testified that she did not remember distinctly, but "it just seemed to me that it was a regular stop; I have an indistinct recollection of some one passing in front of me as though they went out of the front door." This justified a finding that the car was stopped to let passengers get off the car and not to avoid a collision.

Exceptions overruled.

MERRITT *v.* ATLANTIC COAST LINE R. R.

(Supreme Court of North Carolina, March 31, 1910.)

[67 S. E. Rep. 579.]

Railroads—Separate Coaches for White and Colored Passengers—Penalty for Violation of Act.—Revisal 1905, § 2619, requires railroads to provide separate but equal accommodations for white and colored passengers. Section 2620 provides for the exemption by the commission of certain roads and trains. Section 2621 provides when the two races may be put in the same coach, and section 2622 imposes a penalty for not providing separate cars. Held, that failure to furnish the equipment was the cause of the penalty, and no penalty is incurred if a passenger is directed by a train hand or conductor into the wrong car.

Clark, C. J., dissenting.

Appeal from Superior Court, Sampson County; Guion, Judge.

Action by W. M. Merritt against the Atlantic Coast Line Railroad. From a judgment for plaintiff, defendant appeals. Reversed.

Civil action to recover a penalty for violation of what is commonly called the "Jim Crow car law," embodied in Revisal 1905, §§ 2619-2622, inclusive, tried at January special term, Sampson superior court; his honor, Judge Guion, presiding.

The following is the evidence of the plaintiff: "On Wednesday morning, December 29, 1908, we went to Ivanhoe, a station on defendant's railroad. There were four of us, all white, and we bought tickets at Ivanhoe for Tomahawk, the nearest station to our homes. We paid 25 cents for each ticket, and the distance was about 10 miles. When the train came we started towards the steps of the white car. We got on steps of white car and started to go in white coach, and the conductor told us to go into the other car. We went in and found a few colored folks, and they told us we were in the wrong car. We then went out and started to go into the white coach, but the conductor told us to go back into the colored car. There was ample room for us in the white coach, but when the conductor told us to go into the other car we went. He didn't use any threats or do anything to make us go in, except to say, 'Go in that car,' pointing to the car for colored people with his hand. He did not use any force."

J. H. Boney testified for plaintiff: "I was with Merritt. All of us had tickets. We started to go up white steps, and conductor said, 'Go on in the other car.' We then went into the colored car, and some negroes in there told use we were in the wrong car, and we started out to go into the white coach, when the conductor waved his hand and said, 'Go on back in the other

car.' We went back. When conductor came to take up our tickets, I asked him why he put us in the colored car, and he said, 'You want to keep your baggage with you, don't you?' I said I usually kept it. My baggage was rafting gear, axe, etc., in a tow sack. There was plenty of room in the white car, and there was plenty of room in the colored car. The railroad had provided separate cars for the two races; but we are white men and the conductor ordered us to go into the colored car. He did not cuss or abuse us, and did nothing except to tell us to go into the car for the colored race. There was a coach for the whites with plenty of room, but the conductor told us to ride in the colored car."

The plaintiff here rested, and the defendant moved for judgment as of nonsuit, under the Hinsdale act. Motion overruled, and defendant excepted. From a verdict and judgment for plaintiff, the defendant appealed.

F. R. Cooper, for appellant.

BROWN, J. We are of the opinion that the plaintiff is not entitled to recover the penalty denounced by section 2622 of the Revisal for failure to provide separate cars. Where the carrier has obeyed the law and provided separate cars for the white and colored passengers, which afford equal accommodations, no statutory penalty is incurred if the individual passenger is directed by a train hand or conductor into the wrong car. This is manifest from the language of the statutes. Omitting superfluities, section 2619 reads as follows: "All railroad companies shall provide separate but equal accommodations for the white and colored races on all trains carrying passengers. Such accommodations may be furnished by railroad companies either by separate passenger cars or by compartments in passenger cars; which shall be provided by the railroad under the supervision and direction of the corporation commission." Section 2620 provides that the commission may exempt certain roads and trains. Section 2621 provides when the two races may be put in the same coach, and section 2622 imposes a penalty for failing to provide separate cars.

Upon the testimony of the plaintiff, it appears that the defendant had complied fully and in good faith with the statutes cited, and furnished equal and separate accommodations on its train for the white and colored races. Assuming, as contended by plaintiff that the conductor erred in showing plaintiff into the colored car, because he had his rafting gear with him, that does not alter the admitted fact that so far as the carrier is concerned it had complied in good faith with the law and provided separate cars and equal accommodations for the two races. That being so, no statutory penalty is incurred. That our construction is right is manifest from that portion of the law which pro-

vides that the separate cars and accommodations, for failure to supply which the penalty is given, must be furnished by the carrier under the direction and supervision of the corporation commission. As said by the federal court: "The equipment is the required thing, the failure to furnish which brings on the penalty, and not the management of the equipment by the employees." U. S. *v.* Ills. Cent R. R. (D. C.) 156 Fed. 183. That was an action brought by the government for the penalty imposed by the safety appliance act of March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). The District Court held that the penalties were incurred by a failure to furnish the appliances, and not because improperly managed by the company's employees after being furnished.

The motion to nonsuit is sustained.

Reversed and dismissed.

LOUISVILLE RY. CO. *v.* MITCHELL.

(Court of Appeals of Kentucky, May 5, 1910.)

[127 S. W. Rep. 770.]

Judges—Disqualification—Objections—Time.—An objection to a judge for bias must be made at the threshold; and is too late where it comes after other motions.

Carriers—Carriage of Passengers—Injuries—Actions—Questions for Jury.—In an action for injuries to a street car passenger by being struck by another car going in the opposite direction as she was passing around the end of the car from which she had alighted, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.

Carriers—Carriage of Passengers—Care Required.*—A carrier's duty to exercise a high degree of care toward passengers continues until the passenger alights from the car, and has reasonable opportunity to reach a place of safety.

Carriers—Carriage of Passengers—Injuries—Duty to Keep a Lookout.†—Where a street car motorman is about to pass a car which has stopped at a street crossing to discharge passengers, it is his duty to keep a sharp lookout for persons alighting from the car, and who might be expected to cross immediately behind it, and to have his car under such control that he might stop it at a moment's warning.

*For the authorities in this series on the question whether a person may be a passenger of the railroad after he alights from the train or street car, see first foot-note of Powers *v.* Connecticut Co. (Conn.), 34 R. R. R. 434, 57 Am. & Eng. R. Cas., N. S., 434.

†See note on following page.

Louisville Ry. Co. *v.* Mitchell

Carriers—Carriage of Passengers—Injuries—Contributory Negligence—Injury Avoidable Notwithstanding.†—Where a passenger, after alighting from a street car, passed round the end of the car, and was struck by a car traveling in the opposite direction, which she could not see until just before she was struck, she was not barred from recovering by contributory negligence, if the motorman by ordinary care and by keeping a sharp lookout and having his car under control could have stopped the car in time to have avoided the injury.

Appeal and Error—Review—Harmless Error—Remarks of Counsel.‡—In an action for injuries to a street car passenger by the alleged negligence of a motorman, defendant was not prejudiced by the remarks of plaintiff's attorney that the motorman was a strike breaker; it having been promptly excluded by the court.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Annie Mitchell against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh and *Howard B. Lee,* for appellant.

Edward, Ogden & Peak, for appellee.

HOBSON, J. Mrs. Annie B. Mitchell was a passenger on one of the south-bound cars on Second street. There are two tracks on Second street. The north-bound cars run on the east track, and the south-bound cars on the west track. Persons on the south-bound cars have to get off on the west side, and, if they live east of Second street, they have to go across both tracks to get to the sidewalk. Mrs. Mitchell got off at Ormsby and walked across behind her car, which was still standing there. Just as she was leaving the second track, she was struck by a north-bound car, which came up while she was behind the car she had gotten off. She sustained serious injuries from the collision, to recover for which she brought this suit, and in the circuit court there was a judgment in her favor for $2,000. The defendant appeals.

The first point made on the appeal is that the judge before whom the case was tried erred in refusing to vacate the bench

†For the authorities in this series on the subject of the liabilities of a railroad company with respect to its passengers struck by trains while crossing tracks between depot or stopping place and their respective train or car, see first foot-note of Atchison, etc., Ry. Co. *v.* McElroy (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, where all those preceding it are collected; first foot-note of Bloom *v.* Sioux City Traction Co. (Iowa), 33 R. R. R. 784, 56 Am. & Eng. R. Cas., N. S., 784.

‡For the authorities in this series on the subject of arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-note of Hale *v.* San Bernardino Valley Traction Co. (Cal.), 34 R. R. R. 764, 57 Am. & Eng. R. Cas., N. S., 764.

under the affidavit filed by the defendant. The facts about the matter are these: When the case was called, the defendant filed an affidavit for a continuance on the ground of the absence of three witnesses. Before the motion for the continuance was disposed of by the court, one of the witnesses appeared, and thereupon the plaintiff consented that the affidavit might be read as the deposition of the other two witnesses. The defendant then announced ready, and a panel of 18 was drawn from which to select the jury. The plaintiff and the defendant each struck three from the list. At this time the defendant moved the court for a continuance of the case on the ground that it was surprised in that the witness who had appeared would not state what it was alleged in the affidavit she would state. It was stated in the affidavit that she saw the plaintiff just before she was hurt, and the witness would state that the plaintiff was not the person she saw. When this question was made, the court passed the case until the next day. On the next morning when the court met, the defendant filed an affidavit that the judge would not give it a fair trial. The matters relied on in the affidavit all existed, and were known the day before. A motion of this sort must be made at the threshold, and not after other motions are made and disposed of. K. C. R. R. Co. *v.* Kenny, 82 Ky. 154; German Ins. Co. *v.* Landram, 88 Ky. 433, 11 S. W. 367, 592, 10 Ky. Law Rep. 1039; Vance *v.* Field, 89 Ky. 178, 12 S. W. 190, 11 Ky. Law Rep. 388; Hargis *v.* Com., 123 S. W. 239.

The next objection made is that the court should have instructed the jury peremptorily to find for the defendant. The plaintiff's statement as to how the injury occurred is as follows: "I got off the car, and went around the rear end of the car to go to my home, and, when I got around the end of the car, I listened and there was no signal. I heard none, and I am confident there was none, so I thought I was safe, and I started across, and the car got me on the track. I was very near off, and it caught my clothing. I hardly know how it was done, but it was bound to have caught my clothing, for I seemed to be whirled in the air, and came down on this shoulder and arm and side of the head. Q. Where were you when you saw the approach of the car? A. I was on the track. Q. Which way was the car going? A. North. Q. Then after you saw the car, and saw it approaching, what did you do? A. I tried to get out of the way of it, of course. Q. Did you run? A. I didn't run. I just walked faster, and made an effort to get off. Q. How was the car coming with reference to speed, was it coming fast or slow? A. My impression was that it was fast. Of course, I would have gotten across if it had not been. Q. Had you any time heard the signal of this car, any gong or any bell at all? A. Not until just before I was struck. Q. About where were you when you thought you were being tossed into the air? A. Well, I was just

about the edge of the track. There was one of my feet had a mark on the shoe, on the heel. Q. Could you tell me just how far you were thrown. A. Well, I don't know that I can. I don't know whether I can tell how far I was thrown, because I was so dazed at the time. Q. On what part of your body did you fall? A. On my arm and shoulder. Q. Left side? A. Yes, sir." On cross-examination this evidence was given: "Q. As you came back of the car from which you got off, and before you attempted to cross the other track, knowing the track was there, as you say you did, did you give a glance of the eye to see whether the other car was coming? A. Naturally I would. I am not so positive. I did not hear the signal, so I thought I was safe. Q. I am not asking you what you thought or what you might have done; but I am asking you, did you do it? Did you as you passed from behind one car, whether that car was standing still or moving, and before you entered the other track—did you turn your head or even give a glance to see whether or not a car was coming on the track you were about to cross? A. That may appear curious, but I didn't see it until I got on the track. * * * Q. Where were you in the street or with reference to the north-bound track when you say you heard the scream? A. Where was I on the track? Q. Yes. A. I was very near across. Q. Over on to the north side—I mean over to the east side? A. Yes, sir."

On practically this state of facts a recovery was sustained in Louisville Railway Co. *v.* Hudgins, 124 Ky. 79, 98 S. W. 275, 30 Ky. Law Rep. 316, 7 L. R. A. (N. S.) 152, and under the rule laid down in that case, the court did not err in refusing to give the jury a peremptory instruction to find for the defendant. The railway company proved by its witnesses that the north-bound car was going very slow as it passed the south-bound car, that the gong was ringing, and that the car was under control. According to its evidence, the accident was due to the fact that Mrs. Mitchell came around the standing car and upon the other track so close to the north-bound car that the injury to her could not have been avoided by ordinary care on the part of those in charge of that car. But this question was aptly submitted to the jury by the instructions of the court, and we cannot say that the verdict of the jury is not warranted by the evidence. While the numerical weight of the evidence is with the railway company, there are facts in the case warranting the conclusion which the jury reached. The conductor of the south-bound car says that, when the motorman on the north-bound car passed him about the middle of his car, he was kicking the gong, indicating an alarm that somebody was on the track in front. Mrs. Mitchell was behind her car, and if she came in view a half a car's length from the motorman, and he had his car under control, he should have been able to have stopped it or to have

so checked it at least so as not to strike Mrs. Mitchell with great force. The evidence is that she was thrown in the air, and thrown to the ground with such force as to fracture her shoulder. The proof shows that the car struck Mrs. Mitchell with considerable force. She was about the center of the track when the alarm was sounded, and was walking hastily to get across. If this car had been under control, it could not have run as far as it did catching Mrs. Mitchell before she could make two or three steps and striking her with the force it did after the motorman began to kick his gong as an alarm signal.

Carriers of passengers are under obligation to exercise toward their passengers a very high degree of care, and this duty continues until the passenger alights from the car and has a reasonable opportunity to reach a place of safety. In the case referred to the court said: "The duty that persons operating street cars owe to passengers does not end immediately when the passenger has stepped safely to the ground. They are required to, and should, exercise ordinary care to prevent injury by their cars to persons who have left the car while they are attempting to reach the street or a place of safety. It was, of course, the duty of appellee, when she started to cross the tracks, to exercise ordinary care for her own safety, but, although she failed to do this and her failure may have contributed to such an extent to bring about the injury of which she complains, that it would not have happened except for her failure to exercise this degree of care, this will not relieve the appellant of liability if the person in charge of the car that struck her could by the exercise of ordinary care have discovered the peril appellee was in, and, by the exercise of ordinary care, have prevented the injury to her. It was the duty of the motorman in charge of the car at this point and place to keep a sharp lookout for persons alighting from the car, and who might be expected to cross the street immediately behind it, and to have his car under such control that he might stop it at a moment's warning, and it is manifest that, if the motorman had exercised this degree of care, he could and should have discovered the appellee's peril in time to have prevented injuring her."

Practically a similar view was taken by the United States Supreme Court in Chunn *v.* City R. R. Co., 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219. The court there said: "Nor was the plaintiff necessarily wanting in due care in taking her place between the tracks. It was the usual place from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume that the defendant would not commit such an act of negligence, and that, when it stopped one car and thereby invited her to enter it, it would not run

another by the place of her entrance and put her in peril. We think that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence. That issue with the others in the case should have been submitted to the jury with appropriate instructions. Nor is it clear that, even if the plaintiff was not free from fault, her negligence was the proximate cause of the injury. If she carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury." Those in charge of the cars on such a street must know when they pass a car standing at a crossing that the car is there for the purpose of taking on and letting off passengers, and that the passengers getting off that car must cross the street behind it if they desire to reach the other side of the street. That passengers do this is a matter of daily observation. These passengers cannot see a car approaching on the other side until they are practically on that track. It necessarily follows that a due regard for life requires cars as they approach other cars standing for this purpose to be under control and to be so operated as not to endanger the passengers whom the defendant has just set down from its other car, and have had no opportunity to reach a place of safety. They cannot well remain standing in the street; for they would be in danger from other vehicles. Their presence crossing the other track is reasonably to be anticipated whenever a car is seen stopped, and therefore the car approaching such a car on the other track should be run with such care as the safety of these persons demand, and we adhere to the rule laid down in the case cited that proper care is not exercised, unless such approaching car is so under control as it passes the other car that it may be stopped on a moment's notice.

The rule as to contributory negligence in this class of cases has been often laid down by us. It is essential that reasonable signals of the approach of the car should be given, and it is equally essential that the car should be under such control that, if persons are seen on the crossing, danger to them may be avoided by proper care on the part of the motorman. Contributory negligence never bars a recovery where the danger of the person is discovered in time for those in charge of the car by ordinary care to avoid injury to him. But what the motorman in fact sees is not the criterion by which the liability of the company in such cases is to be determined. If he fails to see what he would have seen if he had kept a lookout, the company is as liable as if he in fact saw the person. To hold otherwise would be to allow his disregard of his duty to keep a lookout to place him and the company in a more favorable position than if he had done his duty in this respect. The lookout is essential

to the safety of the travelers on the highway, and public policy requires that a premium should not be placed on his disregard of his duty to keep a lookout. The rule is therefore a sound one which regards him as in fact seeing what he must have seen if he had been on the lookout. It applies in all cases where a lookout duty exists. L. & N. R. R. Co. *v.* Collins, 2 Duv. 114, 87 Am. Dec. 486; L. & N. R. R. Co. *v.* McCoy, 81 Ky. 411; L. & N. R. R. Co. *v.* Earl, 94 Ky. 368, 22 S. W. 607, 15 Ky. Law Rep. 184; L. & N. R. R. Co. *v.* Krey, 29 S. W. 869, 16 Ky. Law Rep. 797; L. & N. R. R. Co. *v.* Hackman, 30 S. W. 407, 17 Ky. Law Rep. 81; Passamaneck *v.* Louisville R. R. Co., 98 Ky. 195, 32 S. W. 620, 17 Ky. Law Rep. 763; Owensboro *v.* Hill, 56 S. W. 21, 21 Ky. Law Rep. 1638; Flynn *v.* Louisville R. Co., 110 Ky. 668, 62 S. W. 490, 23 Ky. Law Rep. 57; Floyd *v.* Paducah R. Co., 73 S. W. 1122, 24 Ky. Law Rep. 2364; Hummer *v.* L. & N. R. R. Co., 128 Ky. 486, 108 S. W. 885, 32 Ky. Law Rep. 1315. Where the law imposes on a person the duty to see, it will not hear him say he did not see what he should have seen. To allow this would be to allow him to shield himself by his own wrong. The principal is applied to public officers in cases of mistake or fraud, and in other matters no less than in negligence cases.

The plaintiff's injuries are serious and permanent. The amount found in her favor is not excessive; and we do not see that the defendant could have been prejudiced by the remark made by the attorney to the effect that the motorman was a strike breaker, when it was promptly excluded by the court.

Judgment affirmed.

LOUISVILLE & N. R. CO. *v.* SETSER'S ADM'R. SETSER'S ADM'R *v.* LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, May 27, 1910.)

[128 S. W. Rep. 341.]

Exceptions, Bill of—Time for Filing—Extension.—The court may extend the time for filing a bill of exceptions before expiration of the time allowed for that purpose to another day in the term, and, when the bill is filed within the time so allowed, it becomes a part of the record.

Trial—Submission of Issue—Sufficiency of Evidence.—Where there is testimony warranting a recovery, plaintiff's right to go to the jury is not affected by the fact that other witnesses whom he introduced may have given contradictory evidence.

Carriers—Ejection of Passenger—Evidence.—Evidence held not to show that an ejected passenger was in a helpless condition when put off the train.

Carriers—Ejection of Passenger—Duty of Carrier.—Under the express provisions of Ky. St. § 806 (Russell's St. § 5350), it is the duty of the conductor to put off a passenger who shall in the hearing of persons or other passengers and to their annoyance utter obscene or profane language, or behave in a boisterous or riotous manner, and the conductor need not wait until he reaches the next station.

Carriers—Ejection of Passengers—Duty of Carrier.—In such a case, the conductor is not required to permit the person to continue on the train upon the promise of another passenger to see that he will hurt nobody.

Carriers—Ejection of Passengers—Duty of Carrier.—The conductor should use ordinary care for the safety of an ejected passenger, and should not put him off in a cut where he would not be safe from passing trains.

Appeal from Circuit Court, Bell County.
"To be officially reported."

Action by Gilbert Setser's administrator against the Louisville & Nashville Railroad Company. There was a judgment for plaintiff, and defendant appealed. Pending appeal, plaintiff moved to strike out the bill of exceptions and brought an original action to set aside an order extending the time for filing the bill and the order filing it. The petition was dismissed, and he appealed. Judgment reversed and remanded in the first case, and affirmed in the second case, and motion to strike the bill overruled.

Charles W. Metcalf, J. W. Alcorn, Chas. H. Moorman, and *Benjamin D. Warfield,* for *Louisville & N. R. Co. B. B. Golden, W. T. Davis,* and *E. F. Baker,* for *Setser's Adm'r.*

HOBSON, J. On the night of April 21, 1906, Gilbert Setser was killed on the line of the Louisville & Nashville Railroad, and the first of these actions was brought to recover for his death on the ground that it was caused by the negligence of the railroad company. Upon a trial of the action at the March term, 1909, of the circuit court, there was a verdict and judgment for $30,000 in favor of the plaintiff. The court at that term overruled the defendant's motion for a new trial, and gave it until the twentieth day of the next April term to prepare and file a bill of exceptions. The March term was held by a special judge, who shortly before the twentieth day of the April term wrote to the defendant's attorney that it was not convenient for him to be present on the twentieth day of the term for the filing of the bill of exceptions referred to, and asked that the time be extended so that he could come down a day or two later. The defendant's attorney then saw one of the plaintiff's attorneys, who agreed to what the judge wished, and thereupon the defendant's attorney went before the court, and the regular judge made an order to the effect that the defendant had on that day tendered its bill of exceptions, but that, the special judge who had tried the case being absent, the defendant was given until May 22d to have it signed and approved. The stenographer had not at that time completed the transcript of the evidence, and this was not in fact tendered with the bill of exceptions. On May 22d, the special judge being present, the bill of exceptions and transcript of the evidence were presented to him, approved, and regularly filed. When the record was filed in this court, the plaintiff entered a motion to strike out the bill of exceptions, and he then brought an original action in the circuit court to set aside the order extending the time for filing the bill of exceptions, and the order filing it. The circuit court sustained a demurrer to his petition, and he, having failed to plead further, dismissed it. From this judgment he appeals.

The motion to strike out the bill of exceptions and the appeal from the order dismissing the plaintiff's petition to set aside the orders referred to will be disposed of together. It was decided in Knecht *v.* Louisville Home Tel. Co., 121 Ky. 492, 89 S. W. 508, 28 Ky. Law Rep. 456, that if a bill of exceptions was filed within the time allowed, but no transcript of the evidence, the transcript of the evidence could not be filed after the court had lost jurisdiction of the case. But here the order extending the time for filing of the bill of exceptions was made before the expiration of the time allowed for that purpose, and was not objected to. Within the time allowed by the order, the bill of exceptions and transcript of evidence were filed, and no objection was made then to the filing of the bill of exceptions or transcript. The court had full power to extend the time for filing the bill of exceptions to another day in the term, and, when the

bill was filed within the time so allowed, it became properly a part of the record. We had practically this question before us in Walling *v.* Eggers, 78 S. W. 428, 25 Ky. Law Rep. 1565, and there so held. The judgment of the circuit court dismissing the petition of the administrator to set aside the orders referred to is affirmed, and the motion to strike out the bill of exceptions and transcript of the evidence is overruled.

The evidence on the trial of the case as to the death of the intestate was as follows: Gilbert Setser was 20 years old. He got on a passenger train at Middlesboro about 10 p. m. on Saturday, April 21st, to go to his father's home. He had been drinking before he got on the train, and continued to drink after he got on it. After the train pulled out of Middlesboro, the conductor started at the front of the train to take up his tickets, and, having walked through the front part of the car set apart for colored passengers, came into the rear part of the car, which was called the "smoker," in which Gilbert Setser was. Before the conductor had gotten into the car Gilbert Setser had had a fuss with a man named France, and also with a man named Sizemore, and Sizemore had drawn a knife on him. There was a considerable commotion in the car, and a beer bottle had been thrown by some one, but apparently not by the deceased. When the conductor came into the car, he was appealed to by two passengers to put the deceased off, saying, if he did not, there would be serious trouble. The conductor made the deceased sit down and told him to be quiet. The deceased sat down, and the conductor began taking up his tickets; but, before he had taken up many fares, the deceased got out of his seat and engaged in a fuss with a brakeman. He was profane, boisterous, and riotous, using in the car vile language. The conductor then took him by the arm, pulled the bell cord, and he and the brakeman started out with him. At this point, finding that the engineer was not obeying his signal, the conductor, according to the testimony for the defendant, opened the conductor's valve, which had the effect to cause the train to stop immediately. Up to this point there is very little conflict in the evidence. From this on the evidence is quite conflicting. According to two witnesses for the plaintiff, the train slowed up a little, and while it was still running the conductor and brakeman took the deceased out on the platform, and when he was on the second step of the car pushed him off. The train being then in a cut, according to these witnesses, the deceased was thrown against the side of the cut, and fell or rolled back under the train. The plaintiff introduced several other witnesses who said that the train did not stop, and he also introduced several witnesses who in effect said that the train was stopped and that the deceased then got off. One witness introduced by him said that the train stopped, the deceased was then put off, and he went running off up toward the en-

gine. The evidence for the defendant was to the effect that the brakeman got down on the ground and helped the deceased off, and then signaled the engineer to go ahead. The evidence for the defendant also showed that the conductor's valve was opened, and that two or three minutes were required to fill the air chambers before the train would start; that, after the train started, and had gotten about 1,500 feet the train stopped a second time, this stop being due to the fact that the fireman saw a man standing on the steps of the engine who said the conductor had put him off the train, and the engineer, as soon as he learned who he was, then stopped the train and made him get off. According to the testimony of the engineer and the fireman, the man then went hurriedly back toward the rear of the train. According to the evidence for the defendant, the place where the deceased was put off the train was about 2,500 feet south of the tunnel. According to the evidence for the plaintiff, he was pushed off in the cut right at the mouth of the tunnel. On the next morning his hat was found a few feet south of the tunnel, one foot was found cut off a few feet inside the tunnel; then a few feet further on one knee, and a few feet further the remainder of his body.

It is insisted for the defendant that only two witnesses testified to his being pushed off the car, and that a number of other witnesses introduced by the plaintiff contradicted this evidence, so that, taking the plaintiff's evidence alone, the mind is left in doubt as to how it was, and therefore a peremptory instruction to find for the defendant should have been given. But the jury might have believed the two witnesses and not have believed the others. Where there is testimony warranting a recovery, the plaintiff's right to go to the jury is not affected by the fact that other witnesses whom he introduced may have given contradictory evidence.

It is also insisted that the plaintiff's petition does not charge the defendant with pushing the deceased off the train while it was in motion. This is true. The petition and the amended petition seem to have been framed on the idea that the deceased was helplessly drunk, and that the defendant was negligent in putting him off in that condition on the side of the track. The idea of his being pushed off the train while it was in motion is not conveyed in the petition, and its general allegations of negligence must be construed to refer to the specific acts which it sets out. There was nothing in the conduct of the deceased after the conductor came into the car that would inform him that the deceased was in such a condition that it was not safe to put him off the train and leave him. It was in April; the weather was good; and there was no reason why a man 20 years old could not take care of himself. The deceased was simply quarreling, profane, and boisterous. His appearance showed perhaps that he was drinking, but he was not helpless. On the contrary, he was

insisting on fighting. There was no evidence to take the case to the jury on the ground that the deceased was in such a condition as to be helpless, and therefore should not have been put off on the side of the track.

When the deceased was profane and boisterous in the car and had behaved as he had, if the conductor had not put him off, and the deceased had hurt one of the passengers, the company would have been justly held responsible for not protecting him by putting the deceased off. We so held under practically the same proof in Louisville & Nashville Railroad Co. *v.* McEwan, 31 S. W. 465, 17 Ky. Law Rep. 406; Id., 51 S. W. 619, 21 Ky. Law Rep. 487. Section 806, Ky. St. (Russell's St. § 5350), provides in substance that if a person while riding on a train shall in the hearing or presence of other passengers, and to their annoyance, utter obscene or profane language, or behave in a boisterous or riotous manner, it shall be the duty of the conductor in charge of the train to put him off. We upheld this statute in C. & O. R. R. Co. *v.* Crank, 128 Ky. 329, 108 S. W. 276, 32 Ky. Law Rep. 1202, 16 L. R. A. (N. S.) 197, and in Com. *v.* Marcum, 122 S. W. 215. Upon the undisputed facts it was the duty of the conductor to put the deceased off the train, under the rule declared in those opinions, and he was not required to wait until he reached the next station.

The plaintiff proved by three witnesses that, as the conductor was taking the deceased from the train, a passenger said to him not to put him off; that he would see that he hurt nobody. The conductor declined to do this, and properly so. If he had trusted to the passenger keeping the deceased quiet, and the deceased had not kept quiet, but had hurt another passenger, the company would have been held responsible. The deceased had forfeited his right to ride on the train, and the conductor was not required to take the chance of a stranger being able to keep him quiet. The evidence was admitted over the defendant's objection and should have been excluded.

While the testimony for the plaintiff did not show a right to recover on the ground set out in his petition, there was evidence introduced by him sufficient to take the case to the jury on two grounds: First, that the servants of the defendant pushed the deceased from the train while it was in motion, against the side of the cut, and thus caused him to fall under the train. Second, that he was put off the train in a deep cut near the mouth of the tunnel where it was not safe to put off a person. The defendant introduced proof showing that on the next morning, about 60 feet from the mouth of the tunnel, there were signs of a man's hands and feet on the clay bank as though one had there tried to climb up the bank and had fallen back; or had been thrown against the bank and had fallen down. While the defendant had the right to put the deceased off the train, he should not have

put him off in a deep cut where he would not be safe from passing trains. There was a freight train following the passenger which came along in a few minutes. The men on this train testified to seeing nothing of the deceased. If the deceased was put off 2,500 feet south of the tunnel, and where the defendant shows he was put off, the nature of that place was such as not to make it improper to put him off there. But if he was put off in the deep cut near the mouth of the tunnel, it would be a question for the jury whether it was a safe place to put one off at. The instructions which the court gave the jury do not present the law of the case. Under the evidence the court should have told the jury, in substance: (1) The conductor had the right to put the deceased off the train, but that it was incumbent upon him in doing so to use ordinary care for his safety. (2) If he put the deceased off in a cut where it was not reasonably safe to put off a man in the ordinary possession of his faculties, and by reason of this the deceased lost his life, they should find for the plaintiff compensatory damages for his death. (3) If he or the brakeman by his direction pushed the deceased from the steps of the car while the train was in motion, and thus caused him to fall under the train and be killed, the plaintiff should recover compensation for the loss of his life, and the jury might in their discretion award such further sum by way of punitive damages as in their judgment was right and proper. (4) Unless the deceased was put off in a cut where it was not reasonably safe for a person in the ordinary possession of his faculties to be put off, or was pushed or thrown by the conductor or brakeman from the train while in motion, and was so caused to be killed, the jury should find for the defendant. (5) If the deceased, after he was put off the train, got on the engine, the engineer had the right to make him get off it, and, if by reason of this he was killed, the defendant is not responsible therefor.

The plaintiff's petition is not sufficient to sustain a recovery on the ground that the place where he was put off was dangerous, or that he was pushed off the train while it was in motion; but, as the evidence was all heard on the trial, we have considered the case on the merits, and on the return of the case to the circuit court the plaintiff will be allowed to amend his petition.

The judgment in first case reversed, and cause remanded for a new trial and for further proceedings consistent herewith.

BARNES *v.* DALLAS CONSOL. ELECTRIC ST. RY. CO.

(Supreme Court of Texas, May 18, 1910.)

[128 S. W. Rep. 367.]

Appeal and Error—Presumptions—Verdict.—An appellate court reviewing a judgment on a verdict must presume that the jury followed the instructions.

Trial—Instructions—Requests.—Where, in an action for injuries to a street car passenger while alighting from a moving car, defendant proved that plaintiff stepped off the car with her back the way the car was going, a charge, predicating contributory negligence on the fact that she alighted from the car while in motion, covered the facts grouped in a requested charge that if she attempted to alight without following the motion of the car and a person of ordinary care would not have so acted, she was guilty of contributory negligence, submitted the issues raised by the evidence.

Trial—Instructions—Issues.—A defendant has the right to have the facts constituting his defense grouped and presented by a request made in proper form, fairly presenting the issues raised by the evidence.

Street Railroads—Injuries to Passengers—Contributory Negligence.*—To prove the contributory negligence of a street car passenger suing for injuries while alighting from a moving car, the burden is on defendant to prove not only that the passenger stepped off the car in motion, but that a person of ordinary prudence would not have so acted, and a charge that if the passenger stepped off the car while moving, not following its motion, she was guilty of negligence, unless a person of ordinary care would have done so, was properly refused because it required the passenger to show that a person of ordinary prudence would have acted as the passenger did to acquit her of contributory negligence.

Trial—Instructions—Requests—Requisites.—A party seeking by a special charge to make clearer the charge given must so express his proposition that the jury may not be misled thereby.

*For the authorities in this series on the question whether it is contributory negligence to alight from a moving street car, see foot-note of Birmingham, etc., Co. *v.* Dickerson (Ala.), 29 R. R. R. 693, 52 Am. & Eng. R. Cas., N. S., 693; Cosgrove *v.* Consolidated Ry. Co. (Conn.), 29 R. R. R. 679, 52 Am. & Eng. R. Cas., N. S., 679; foot-note of Birmingham, etc., Co. *v.* Harden (Ala.), 30 R. R. R. 655, 53 Am. & Eng. R. Cas., N. S., 655; fourth head-note of Armstrong *v.* Portland Ry. Co. (Ore.), 31 R. R. R. 89, 54 Am. & Eng. R. Cas., N. S., 89.

For the authorities in this series on the subject of the burden of proving contributory negligence of passengers, see second foot-note of St. Louis, etc., Ry. Co. *v.* Gilbreath (Ark.), 32 R. R. R. 201, 55 Am. & Eng. R. Cas., N. S., 201; last foot-note of Miles *v.* St. Louis, etc., R. Co. (Ark.), 32 R. R. R. 184, 55 Am. & Eng. R. Cas., N. S., 184.

Barnes *v.* Dallas Consol. Electric St. Ry. Co

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by T. W. Barnes against the Dallas Consolidated Electric Railway Company. There was a judgment of the Court of Civil Appeals (119 S. W. 122), reversing a judgment for plaintiff, and he brings error. Reversed, and judgment of the district court affirmed.

Marcus M. Parks, for plaintiff in error.
Baker, Botts, Parker & Garwood, Finley, Knight & Harris, and *Walter H. Walne,* for defendant in error.

BROWN, J. T. W. Barnes instituted suit in the district court of Dallas county against the railway company to recover damages occasioned to his wife under the following state of facts which were proved by the evidence of several witnesses: Mrs. Barnes was a passenger on a car of the defendant company in the city of Dallas, intending to depart from it at the interurban station, and as the car approached the station the conductor rang the bell for a stop, and Mrs. Barnes and other passengers arose to their feet preparatory to leaving the car. After the car had stopped, or when it was moving so slowly that she said she did not know it was moving, while Mrs. Barnes was standing in the car, the motorman turned on the power and caused the car to move with great violence, so that it threw her out of the car into the street on her head, inflicting upon her serious injuries.

The company pleaded contributory negligence and in support of the plea proved these facts: That as the car approached the place for stopping, but while it was yet in motion, Mrs. Barns left the car and was standing on the running board, and, while the car was in motion, stepped from the running board with her back in the direction in which the car was going, or, as testified to by other witnesses, she stepped straight out from the car and was thrown to the ground. This testimony of the defense raised the issue that she did not observe the motion of the car, by stepping in the same direction that the car was moving, which the company claimed constituted contributory negligence and exonerated it from liability.

The trial court submitted to the jury upon the question of contributory negligence the following charge: "You are further instructed, that it was the duty of Mrs. Barnes on the occasion of this accident to use ordinary care for her own safety, that is, such degree of care as any ordinarily prudent person would have used under similar circumstances; and that if you find and believe from the evidence that the plaintiff's wife did not on the occasion of said accident use that degree of care for her own safety, then she was guilty of negligence. If you

find and believe from the evidence that Mrs. Barnes left a place of safety in said car while same was in motion, and proceeded to the edge of said car and to the running board thereof while the car was in motion, or that she attempted to alight from one of defendant's cars while the same was in motion, and before it had stopped for passengers to alight therefrom, and if you further find that plaintiff's wife was negligent according to the rule of negligence laid down in this charge in all or either of said respects, and if you further find that such negligence, if any, on the part of plaintiff's wife was the proximate cause of the accident to her, then you will return a verdict for the defendant."

The defendant requested the court to give the following charge on the subject of contributory negligence, which was refused: "You are instructed that if you should find and believe from the evidence that plaintiff herein attempted to alight from one of the defendant's cars while the same was moving, and that in alighting therefrom she did not follow the motion of the car, but stepped therefrom in a negligent manner, and that a person of ordinary care would not have so acted under the same or similar circumstances, then this would constitute contributory negligence on the part of plaintiff, and you will return your verdict for the defendant; and this regardless of whether you find the defendant was in any manner negligent, and regardless of your finding upon any other issue herein."

The jury returned a verdict in favor of the plaintiff, and upon appeal to the Court of Civil Appeals of the Fifth District a majority of the court held that it was error for the trial court to refuse the special charge and reversed and remanded the case. 119 S. W. 122. Justice Bookhout dissented from this decision, and upon that dissent the case is before this court.

If the jury followed the instruction given by the court in the charge above quoted, and we must presume that they did, they must have believed that Mrs. Barnes did not alight from the car while it was in motion, or if she did step off the car with her back to the direction in which the car was moving, or if she alighted from the car while in motion, stepping straight out at right angles from the direction in which it was moving, or if she otherwise failed to "follow the motion of the car," still she was not guilty of contributory negligence, for the reason that a person of ordinary prudence under the same or similar circumstances would have done as she did. The charge given by the court predicated contributory negligence on Mrs. Barnes' part upon the one fact that she alighted from the car while in motion, which embraced all of the facts grouped in the special charge, and more. It therefore cannot be said that the charge given did not submit to the jury all of the issues raised by the evidence. It is true that the defendant had the

right to have the facts which constituted its defense grouped and presented to the jury by a request made to the court in proper form, fairly presenting the issues raised by the evidence.

Keeping in view the character of the charge given by the court, we will examine the special charge requested to determine whether it was so framed as to require the court to give it. The effect of the charge was to tell the jury that if Mrs. Barnes stepped off the car while moving, not following its motion, she was guilty of negligence, unless the evidence showed that a person of ordinary prudence would have done so. A correct charge on the subject would have submitted to the jury the issue whether she did the act, and, if so, was she negligent in so doing, prescribing the test of negligence that an ordinarily prudent person would not have so acted. To sustain its plea of contributory negligence the burden was on the defendant to prove by a preponderance of the evidence, not only the fact that Mrs. Barnes stepped off the car in motion, but it must appear from the evidence that a person of ordinary prudence would not have so acted. The rejected charge reversed the rule and virtually required that evidence should show that a person of ordinary prudence would have so acted, in order to acquit Mrs. Barnes of the charge of contributory negligence.

The best that can be said for the special charge is that it is ambiguous and might have been construed as claimed by the defendant in error, but its very ambiguity condemns it when presented to a court for submission to the jury. If by submitting a special charge, a party seeks to make clearer the charge which is given by the court, it is incumbent upon him to so express his proposition that the jury may not be misled thereby. We are of opinion that the trial court did not commit error in refusing to give the special instruction.

We have carefully examined all of the assignments of error presented in the Court of Civil Appeals and find no reversible error in the rulings and decisions of the trial court. It is therefore ordered that the judgment of the Court of Civil Appeals, reversing the judgment of the trial court and remanding this cause, be reversed, and that the judgment of the district court be affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. *v.* GIROD

(Supreme Court of Alabama, June 30, 1909. Rehearing Denied Dec. 16, 1909.)

[51 So. Rep. 242.]

Carriers—Carriage of Passengers—Personal Injuries—Actions—Pleading.*—A plea of contributory negligence of a passenger, injured in alighting from an electric car, which alleges that she was guilty of negligence proximately contributing to her injuries, in that she rode on the platform in violation of a rule published in the car in such a way that she could have seen it, is insufficient as failing to show notice of the rule and causal connection between its violation and the injury.

Husband and Wife—Actions—Pleadings.—Allegations, in a husband's complaint for personal injuries to his wife, that she fell and thereby received internal and external injuries and was permanently injured, and that he lost her services and society, are sufficient to allow evidence as to the loss of her voice in consequence of the injuries, though the loss of voice is not specifically alleged.

Pleading—Demurrer.—A complaint for personal injuries, which is too general in its averments as to the nature, character, or extent of the injuries, should be corrected by a demurrer.

Trial—Reception of Evidence—Objections.—An objection to a question on the ground that the answer is not shown to be necessary may be overruled, unless it is apparent that the answer cannot be made competent or relevant by other evidence.

Carriers—Carriage of Passengers—Contributory Negligence—Questions for Jury.†—A passenger, incumbered with small bundles, who steps from an electric car in the dark, while it is slowing up to stop and is barely moving, is not guilty of contributory negligence as a matter of law.

Carriers—Carriage of Passengers—Contributory Negligence—Questions for Jury.*—A charge that a passenger, riding on the platform of an electric car without supporting herself with either hand, is guilty of contributory negligence, is properly refused.

Trial—Instructions—Requests.—Requested charges, asserting propositions of law embraced in charges given, are properly refused.

*For the authorities in this series on the question whether it is contributory negligence for a passenger to stand on the platform of a car, see last foot-note of Davis *v.* Atlanta, etc., Ry. Co. (S. Car.), 34 R. R. R. 249, 57 Am. & Eng. R. Cas., N. S., 249; last paragraph of last foot-note of Coburn *v.* Moline, etc., Ry. Co. (Ill.), 34 R. R. R. 429, 57 Am. & Eng. R. Cas., N. S., 429.

For the authorities in this series on the subject of the contributory negligence of passengers in violating the rules and regulations of the carrier, see last foot-note of Coburn *v.* Moline, etc., R. Co. (Ill.), 34 R. R. R. 429, 57 Am. & Eng. R. Cas., N. S., 429.

†See first foot-note of preceding case.

Birmingham Ry., Light & Power Co. *v.* Girod

Trial—Reception of Evidence—Objections—Effect of Failure to Object.—Where evidence showing the amounts paid for nursing and medical treatment on account of personal injuries was admitted without objection to its competency or relevancy, charges that no recovery could be had for such items, because not shown to be reasonable, were properly refused.

Carriers—Carriage of Passengers—Personal Injuries—Actions—Instructions.—There being evidence that a street car passenger was injured, while alighting, by a sudden increase in the speed of the car, it was proper to refuse to charge that it was not the conductor's duty to know of the passenger's position of peril at the time the speed of the car was increased.

Trial—Instructions—Assumption of Facts.—Charges assuming as true material facts, not admitted nor conclusively proved, are properly refused.

Carriers—Carriage of Passengers—Personal Injuries—Actions—Instructions.—A charge, exonerating a carrier from liability for injuries to an alighting passenger if the jury find that the crew of the car did not know that she intended to alight before reaching the usual stopping place, is properly refused.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by L. N. Girod against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The allegations of damage in the complaint are as follows: "She was caused to fall with great force and violence, and thereby received internal and external injuries to her body, and was greatly shaken up, and her nervous system greatly shattered and impaired, and she was for a long time wholly confined to her bed, was permanently injured, and plaintiff was put to great expense for medicine, medical care, and treatment, in and about his efforts to heal and cure the wounds and injuries of his said wife, and was deprived of and lost the services and society of his said wife, and suffered great mental and physical pain." The evidence for the plaintiff tended to show that he had to send his wife to Hopkinsville, Ky., for treatment, and pay her railroad fare there and back. The other evidence sufficiently appears in the opinion of the court.

The second plea was as follows: "Defendant, for answer to each count of the complaint separately and severally, says that the plaintiff's wife was herself guilty of negligence which proximately contributed to her injuries, in that she rode on the platform of defendant's car while it was in motion, in violation of a rule of the defendant published in the car in which the plaintiff was riding as a passenger at the time of her injury in

such a way that the plaintiff by exercise of reasonable care have seen before riding on the platform." The demurrers were: "The plea fails sufficiently to set forth the negligence of the wife. It fails to show that plaintiff's wife knew of the alleged rule. The alleged rule is not set forth with sufficient certainty. The negligence averred is a conclusion." The other pleas are sufficiently set forth in the opinion.

The following charges were refused to the defendant: (1) "If the jury believe from the evidence that the plaintiff's wife voluntarily stepped from defendants' car while it was moving, and before it had reached its regular stopping place, of which facts she was aware, and if the jury further believe that when she so stepped from the car it was dark, and she had a can in one hand and a package in the other, then plaintiff's wife was guilty of negligence." (2) "If the jury believe from the evidence that plaintiff's wife voluntarily stepped from defendant's car in the dark, and while it was moving, and before it had reached its regular stopping place to discharge passengers, and that she had a can in one hand and a package in the other, plaintiff's wife was guilty of contributory negligence." (18) "If the jury believe from the evidence that plaintiff's wife consciously and purposely stepped from the car she was riding on in the dark, and while it was moving, and that this proximately contributed to her injury, the jury must find for the defendant." (20) "If the jury believe from the evidence that the plaintiff's wife voluntarily, and while incumbered with a can and in the dark, stepped from defendant's car while it was in motion, and that her doing so proximately contributed to her injuries, the jury must find for the defendant." (10) "If the jury believe from the evidence that the plaintiff's wife, at the time of the accident, was on the platform of defendant's car while it was moving, with a can in one hand and a package in the other, and without holding or supporting herself with either hand, the jury must find that she was guilty of negligence." (15) "It was not the duty of the conductor to know before increasing the speed of the car that the plaintiff's wife was not in a position of peril from such increase of speed, if at the time the speed had increased the car had not reached its regular stopping place for the discharge of passengers." (16) "The calling of the name of the station in the car by the conductor would not be an invitation to plaintiff's wife to alight until the car had come to a stop after the name of the station was called." (19) "If the jury believe from the evidence that the conductor called the name of the station as the car approached it, still the plaintiff's wife would not have been justified therefrom in alighting from the car while it was in motion, and before it had reached its regular stopping place for discharging passengers." (21) "If the jury believe from the evidence that the defendant's car

had not reached the usual place for discharging passengers when plaintiff's wife tried to get off the car, and if the jury further believe from the evidence that the crew of the car did not know that she intended to alight before reaching the usual stopping place until after the accident, the jury must find for the defendant."

Charges 6, 7, 8, and 9 assert that plaintiff cannot be awarded any damages for the amount of money paid as nurse's wages, or the amount paid Dr. Wynne, or for loss of his wife's services in cooking, or for any injury to his wife's voice. Charges 11, 12, and 13 assert that no damages can be awarded plaintiff for the amounts paid Drs. Copeland or Heacock or Brown. Charge 14 asserts that he cannot recover for any money expended for clothing, shoes, and medicine for his wife's nurse during her sickness. Charge 17 asserts that the jury cannot award plaintiff any damages for the shortening of his wife's left leg, or for the injury to her left hip, though the jury may believe from the evidence that such an injury existed.

Motion for new trial was made, based on the ground that the damages are excessive and that the verdict was contrary to the evidence.

Tillman, Grubb, Bradley & Morrow and *L. C. Leadbeater,* for appellant.

Stallings & Drennen, for appellee.

MAYFIELD, J. This is an action by plaintiff, as a husband, for lost services due to a personal injury received by his wife, while a passenger on defendant's electric car, in being thrown from it, while alighting at her destination, by a sudden starting or increase in speed of the car. The complaint originally consisted of three counts. The third was withdrawn by amendment. Each count charged simple negligence only.

Defendant filed six special pleas of contributory negligence. Demurrer was sustained to the second plea, charging plaintiff's wife with negligence in riding on the platform, in violation of defendant's rule published in the car. The rulings on demurrers to the complaint are not insisted on. The remaining special pleas, demurrers to which were overruled, charged contributory negligence in riding on the platform without properly holding on, and in alighting from the car, in the dark, and incumbered with bundles, while it was in motion.

Plaintiff's evidence tended to show that his wife was a passenger from Birmingham to Ensley on defendant's electric car, and her destination was Nineteenth street and Avenue E, Ensley, which was the terminus of the car line; that when the car approached the terminus the conductor called out "Ensley," or "All out for Ensley," after the car stopped, and she arose from her seat and went to the rear of the car, with other passengers,

to alight, and was the last one to alight; that while on the platform, in the act of alighting, with a gallon can of milk in her hand, and not holding on, the car started with a sudden jerk and threw her to the ground; that she heard the conductor ring the bell to start, he being on the inside; that she was first taken to the hotel at Ensley, near the terminus, and hence in an ambulance to her home; that on the way to her home in the ambulance she lost her voice, and had since been unable to speak above a whisper; that her vision was also injuriously affected after the accident; that she remained confined to her bed for months; that her hip was fractured, and she could only walk on crutches up to the time of the trial, and that she had broken ribs; that the plaintiff had employed Dr. W. H. Wynne, Dr. B. G. Copeland, Dr. Heacock, and Dr. Manning Brown, of Hopkinsville, Ky., where he had sent his wife for treatment, to treat her, and had also paid doctor's bills to each in amounts testified by him, and had paid nurse's wages and his wife's railroad fare from Birmingham to Hopkinsville, Ky., and return, when she went there for treatment (record, pages 14 and 15); that Dr. Manning Brown had never treated her before the accident; that plaintiff had to hire a cook after the accident, to whom he paid $3 a week and board; that he paid the nurse wages, and also furnished her with shoes, clothing, and medicine as part of her wages, and with board. There was no evidence introduced as to the reasonableness of the amount paid the doctors, nurse, and cook. The evidence is set out in full, except the doctors', and on page 30 of the record is a recital in the bill of exceptions that the testimony of the doctors not set out in extenso related to the plaintiff's wife's condition and extent of her injuries, "but to no other facts bearing on any of the issues involved, and whose evidence is not for that reason set out in extenso in the bill of exceptions." The evidence of the physicians was of great length, and for that reason, and the additional reason that the extent of plaintiff's wife's injuries is only involved in the exception based on the motion for a new trial because of excessive damages, which is not insisted on, was not set out in full.

Defendant's evidence tended to show that the plaintiff's wife attempted to alight before the car reached its usual stopping place for discharging passengers, and while it was moving; that it was dark, and that she had bundles in one hand and a can in the other; that she stepped off of her own accord and fell, the car not stopping till it reached the usual stopping place for discharging passengers; that the conductor called "All out for Ensley" while the car was still in motion, and that it did not come to a stop after he announced the name of the station and until after the plaintiff's wife had fallen; that the car plaintiff's wife was riding on was following another car, and would slow up to permit it to get far enough ahead, and then start again forward,

but never did come to a stop till it reached the terminus, where passengers were accustomed to get off. The evidence of the defendant also tended to contradict the alleged serious character of the palintiff's wife's injuries.

The action being that of the husband, the measure of damages was for loss of his wife's services and society.

Plea 2 was insufficient in that it failed to show that the passenger had notice, actual or constructive, of the rule set up as a defense, and it does not sufficiently allege a causal connection between the violation of the rule and the injury alleged in the complaint. It may be there was an attempt to conform the pleas to these requirements. They were insufficient, and the demurrer was therefore properly sustained.

The allegations of the complaint were sufficient, as to the character and extent of the injuries received by the passenger, to allow evidence as to the loss of voice in consequence of the injuries, though the loss of voice be not specifically alleged. It is not required to aver in specific terms each injury or pain suffered. The injury, its character, nature, and extent, may be sufficiently averred, without detailing, enumerating, or specifying each separately. The loss of voice might well be included in some of the injuries alleged. The loss of the wife's voice was certainly an element of the damages suffered by the husband in consequence thereof. If the complaint was too general in its averments as to the nature, character, or extent of the injuries suffered and complained of, the defendant should have had this corrected by a demurrer to the complaint. Henry's Case, 139 Ala. 166, 34 South. 389; 16 Ency. Pl. & Pr. 377-383, and notes. See, also, Curran *v.* Strange, 98 Wis. 598, 74 N. W. 377.

If there was error in overruling defendant's objection to the question, "What was the fare to Hopkinsville, Ky?" it is not made to appear. We can see no objection to the question itself. The apparent answer to it might or might not be competent or relevant evidence, depending upon other evidence or other facts necessary to make it relevant or irrelevant. The objection to this question was not followed up by objections to, or motion to exclude, the evidence. So far as appears, the defendant may have waived the error, if error it could be, or consented to the answer. The only insistence made is that it was not shown to be necessary. Sanders *v.* Knox, 57 Ala. 81.

Charges 1, 2, 18, and 20, each, as appellant admits, asserted, in varying language, the same proposition, that it was as matter of law contributory negligence on the part of the passenger in this case to step from the car voluntarily and consciously, incumbered with bundles, in the dark, and while it was moving, and had not reached the regular stopping place for the discharge of passengers. Each of these charges was refused to the defendant, and properly so. It may, or may not, be negligence

for a passenger to step from a moving car or train in the dark, incumbered with bundles. This depends upon the kind of car or train, its construction, the speed of the car at the time, the size and character of the bundles, the condition of the passenger, age, health, etc., the place, time, and occasion of alighting, etc. While some of these charges hypothesized some of the conditions which would make the passenger liable, no one of them hypothesized all. For example, suppose an ordinary electric car is slowing up to stop and is barely moving, and a passenger step off with some small bundles in his hand; can it be said as matter of law that this is contributory negligence? We think not. If so, nearly all who ride in such cars are uniformly guilty of contributory negligence. There may be some who do not. If so, they are the exception, and not the rule. If the passenger be incumbered with heavy bundles, the car moving rapidly, he would be guilty of contributory negligence. It is the apparent danger of the act that renders it negligence. In the one case, the danger is apparently; in the other it is not, if it exists at all. True, there are some cases holding that it is as matter of law contributory negligence to step off a car in motion, and especially so when incumbered with bundles; but we think the great number and weight of authority hold that such is not negligence as matter of law, but may be as a matter of fact, depending, of course, upon the circumstances of each particular case. There are no doubt many cases of the kind where the act can be and has been declared negligent as matter of law, but in most cases of the kind it is properly a question for the jury. Watkins' Case, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297. Such was the Case of Rickets, 85 Ala. 604, 5 South. 353, and Hunter's Case, 150 Ala. 594, 43 South. 802, 9 L. R. A. (N. S.) 848.

We do not think the facts hypothesized brought the charges within the rule announced in any one of these two cases, declaring such acts or facts as matter of law are negligent. Elliott on Railroads, vol. 4, §§ 1628, 1841; Hutchinson on Carriers, vol. 3, § 1177 et seq; Hunter's Case, 150 Ala. 594, 43 South. 802, 9 L. R. A. (N. S.) 848. And if it could be said to have been error to refuse any one of these charges it was without injury. It affirmatively appears that the trial court gave one or more charges requested by defendant which unquestionably instructed the jury correctly upon the identical and only proposition of law involved in each of these charges refused.

It is conceded by appellant that, if the plaintiff was entitled to recover, he was entitled to recover the amounts which were reasonably expended by him in the way of nursing and treatment of his wife, rendered necessary on account of her injuries; but it is insisted that the evidence to establish the various items, the salary of the nurse, the cost of her board, lodging, and clothing, while nursing the plaintiff's wife, did not show that the amounts

expended were reasonable, or that the items were reasonably worth the amounts paid, and, therefore, the court at the request of the defendant should have charged the jury that no recovery could be had as to the various items. It was not error to refuse all such charges requested. True, the measure of the recovery for such items is the reasonable value or cost thereof, and not what was actually paid, or contracted to be paid. It does not appear that the amounts paid, or any one of them, was unreasonable; and can the court presume that it was, in the absence of the proof? If there be any presumption (and we do not say there is), would it not be that the amounts paid were reasonable, rather than that they were unreasonable? The objections as to this matter should have been interposed to the evidence when offered. The competency of it, and relevancy of it, was waived by a failure to object to its introduction. For aught we can know, the defendant did not object, because it was favorable to it. The evidence cannot be wholly eliminated by charges. It was certainly proper for the jury to consider it, in connection with all the other evidence, in determining what was the reasonable value or cost of such items, which were legitimate and proper charges. Counsel are in error in supposing there was no evidence to show that the amounts were reasonable. 4 Sutherland on Damages, § 1250, and notes.

The same is true as to the charges asserting that plaintiff could not recover the amounts paid the doctors for treating and attending his wife on account of the injuries inflicted by defendant, because not shown to be reasonable. Neither the trial court nor this court can know that these amounts were unreasonable. They are as liable to be less than the reasonable value as to be more. The record shows that the evidence of the physicians, who were examined as witnesses, was not set out in the bill of exceptions. For aught we can know, this evidence may have shown that all the amounts paid were reasonable. We cannot indulge presumptions, in the absence of proof, against the action of the trial court as to these matters. It appears that no objection whatever was made to the evidence as to amounts paid for nursing and treating the patient. A party will not be allowed to speculate on evidence in this manner. Parties may try their cases on immaterial evidence if they desire; but they will be allowed to introduce evidence, to admit it, or to consent to it, without protest or objection, and then have the court charge the jury that they cannot find a verdict on it, because not competent or relevant—especially when the charge itself does not point out or call the court's attention to the evidence complained of, but merely requests a verdict as if no evidence had been admitted as to the question.

Suppose A. sues B. for an assault and battery, and all the evidence shows that B. did assault and beat him as alleged, and

A. testifies that his actual damages were $1,000 in consequence thereof. No objection is made to this evidence, and this is all; and B. requests the court to charge the jury that A. cannot recover any actual damages. Is it possible it would be error to refuse the charge because the evidence was incompetent? Certainly not. If not objected to, it will support a verdict, as if it were both competent and relevant.

Charge 10 was properly refused. It does not assert a correct proposition of law, and, besides, the proposition intended to be asserted by it was embraced in one of the charges, requested by the defendant, which was given.

Charge 15 was properly refused because of its wording. As written it would have tended to mislead or confuse the jury, but aside from this it was properly refused. The court, under the evidence in this case, should not have instructed the jury that it was not conductor's duty to know of plaintiff's wife's position of peril at the time the speed of the car was increased.

Charges 16 and 19 were each properly refused, because they assumed as true material facts, which were not admitted, conceded, nor conclusively proven. Both of these charges find substantial duplication in charges given at the request of the defendant.

Charge 21 did not state a correct proposition of law.

The judgment of the lower court is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur.

STEVERMAN *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk, May 17, 1910.)

[91 N. E. Rep. 919.]

Carriers—Injuries to Passenger—Care Required.—A carrier is bound to exercise, in the management of its cars, the highest degree of care required by the circumstances to protect its passengers from injury during transportation.

Carriers—Injuries to Passenger—Contributory Negligence—Question for Jury.*—Where an explosion occurred beneath the floor of an electric car, accompanied by an outburst of flame, which set fire to the dress of a female passenger, whether she was guilty of contributory negligence in overestimating the danger, and injurying herself by suddenly jumping to one side, was a question for the jury, though the evidence showed that, if she had remained in her seat, she would have suffered no injury.

Carriers—Injuries to Passenger—Contributory Negligence—Acts in Emergency.†—Where a female passenger reasonably anticipated injury from an explosion in an electric car, accompanied by a slight outburst of flame, she was not chargeable with contributory negligence in unnecessarily attempting to escape the danger, though it appears that, if she had remained in her seat, all danger would have been avoided.

Carriers—Injuries to Passenger—Pleading and Proof.—In an action by a passenger for injuries, an allegation in the declaration that plaintiff's injury was caused by means of fire being set to her clothing from an electrical heating apparatus of said car, or through the appurtenances of said car, was sufficient to warrant the admission of evidence as to the presence of fire, from whatever source it may have sprung, preceded by an explosion which set in motion a train of uninterrupted events resulting in plaintiff's injury.

Carriers—Injuries to Passenger—Proximate Cause.‡—Where an

*See second foot-note of Christensen *v.* Oregon Short Line R. Co. (Utah), 34 R. R. R. 253, 57 Am. & Eng. R. Cas., N. S., 253; fourth foot-note of Irwin *v.* Louisville & N. R. Co. (Ala.), 34 R. R. R. 11, 57 Am. & Eng. R. Cas., N. S., 11; Colorado & S. Ry. Co. *v.* McGeorge (Colo.), 33 R. R. R. 700, 56 Am. & Eng. R. Cas., N. S., 700.

†See extensive note, 34 R. R. R. 733, 57 Am. & Eng. R. Cas., N. S., 733; last foot-note of Big Sandy & C. R. Co. *v.* Blankenship (Ky.), 34 R. R. R. 213, 57 Am. & Eng. R. Cas., N. S., 213.

‡For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see second foot-note of Craig *v.* Great Northern Ry. Co. (Wash.), 34 R. R. R. 675, 57 Am. & Eng. R. Cas., N. S., 675; last foot-note of Brown *v.* Chesapeake & O. Ry. Co. (Ky.), 34 R. R. R. 714, 57 Am. & Eng. R. Cas., N. S., 714; St. Louis, etc., R. Co. *v.* Pollock (Ark.), 34 R. R. R. 240, 57 Am. & Eng. R. Cas., N. S., 240; third foot-note of Yeates *v.* Illinois Cent. R. Co. (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; last foot-note of Bloom *v.* Sioux City Traction Co. (Iowa), 33 R. R. R. 784, 56 Am. & Eng. R. Cas., N. S., 784; Cleveland, etc., Ry. Co. *v.* Powers (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563.

explosion occurred in the heating apparatus in an electric car, accompanied by an outburst of flame, which set fire to the dress of a female passenger, personal injuries received by such passenger while attempting, in her fright, to escape the danger, must be treated in assessing damages as the direct result of the accident, though she was not in fact injured by the fire.

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Actions by Albertina Steverman and by Clement C. Steverman against the Boston Elevated Railway Company. From a judgment for plaintiff in both cases, defendant brings exceptions. Exceptions overruled.

While plaintiff Albertina Steverman was sitting in an electric car as a passenger, an explosion occurred, accompanied by an outburst of flame, which set fire to her clothing. She was greatly frightened, and made a quick movement to escape the apparent danger, and suffered injuries which she described as follows: "I was sitting there, and all of a sudden my ankles felt hot, and I looked down and saw the flames gushing right out, and my clothes got afire, and I jumped very quickly aside, and I don't know—I must have wrenched my side or got a shock of some kind, but I jumped, and in doing so, I got a terrible stitch in my right side here. A gentleman opposite me jumped across the car and clapped the flames out. I was up then, and I sat down again to rest. I was in a terrible nervous condition, and I felt all of a tremble, and I had this terrible pain all through me, and it seemed to go to my head—a kind of clinching."

Coakley & Sherman, D. H. Coakley, and *W. M. Hurd,* for plaintiff.

R. A. Sears and *J. E. Hannigan,* for defendant.

BRALEY, J. The defendant contends that verdicts should have been ordered in its favor, as there was no proof of physical injuries received by Mrs. Steverman, to whom we shall refer as the plaintiff, or, if the evidence warranted a finding to the contrary, the cause of action proved is not described by the allegations of the declaration. The plaintiff having been accepted as a passenger, the defendant became bound to exercise, in the management of its car, the highest degree of care required by the circumstances to protect her from injury during transportation. Marshall *v.* Boston & Worcester Street Railway, 195 Mass. 284, 81 N. E. 195. It is not easy to suggest by way of illustration, incidents arising from the manner in which a car may be operated by electricity, more likely to cause passengers great apprehension of bodily harm, than the situation with which the plaintiff, without warning, or previous experience, was confronted. In substance.

her description of what happened was uncontroverted. Upon taking a seat the car proceeded, when, her attention having been attracted by a sensation of heat, she saw flames flash out from the part of the car where she was riding, and that her clothing had taken fire. If she at once jumped away from the danger, the jury would have been justified in finding that she acted from a natural instinct of self-preservation, and that the apprehension of the peril was none the less real because, after a fellow passenger "clapped" out the fire in her clothing, it appeared that her dress and boots were only slightly scorched. The defendant, while introducing testimony of a flash, followed by smoke and a slight outburst of flame, causing the passengers to leave their seats, which they shortly resumed after the conductor made an investigation, offered no explanation of the explosion, and the plaintiff as the evidence stood had been exposed to a sudden and grave danger, for which the defendant could be found liable. Cassady *v.* Old Colony St. Ry. Co., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; Gilmore *v.* Milford & Uxbridge St. Ry., 193 Mass. 44, 78 N. E. 744; Carroll *v.* Boston Elevated Ry., 200 Mass. 527, 86 N. E. 793. By remaining seated, the fire might have spread to other parts of her clothing, becoming more difficult to extinguish, and even if the occurrence was of such short duration that she need not have moved, it was a question of fact whether she used ordinary precaution. It is sufficient if, with a reasonable anticipation of bodily injury as the situation then appears, a passenger acts on the urgency of the moment, and is hurt, although afterwards it may be plain that by mere inaction all danger would have been avoided. Cody *v.* New York & New England Railroad, 151 Mass. 462, 468, 24 N. E. 402, 7 L. R. A. 843; Gannon *v.* New York, New Haven & Hartford R. R., 173 Mass. 40, 41, 52 N. E. 1075, 43 L. R. A. 833; Hamley *v.* Boston Elevated Ry., 201 Mass. 55, 58, 87 N. E. 197. Nor was the declaration insufficient. If the plaintiff's injury was alleged to have been caused "by means of fire being set to her clothing from an electrical heating apparatus of said car, or through the appurtenances of said car," the presence of fire, from whatever source it may have sprung, preceded by an explosion, set in motion a train of uninterrupted events, resulting in the plaintiff's injury. Oulighan *v.* Butler, 189 Mass. 287, 292, 75 N. E. 726, and cases cited; Doe *v.* Boston & Worcester St. Ry., 195 Mass. 171, 80 N. E. 814; Miller *v.* Boston & Northern St. Ry., 197 Mass. 535, 539, 83 N. E. 990.

The defendant's principal argument, however, is, that the first, third, and fourth requests should have been given, as there was no evidence of external physical injury. Spade *v.* Lynn & Boston Railroad, 168 Mass. 285, 290, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. But through the defendant's negligence fire

had been generated, and communicated to her clothing, even if it did not burn her body. It is not only an assault, but a battery by the actor, where a dangerous physical force which he has intentionally put in motion comes in contact with the clothing of the person against whom it is directed, although he may be neither bruised nor wounded. Com. *v.* Hagenlock, 140 Mass. 125, 3 N. E. 36; Com. *v.* Hawkins, 157 Mass. 551, 32 N. E. 862; Respublica *v.* De Longchamps, 1 Dall. 111, 1 L. Ed. 59; U. S. *v.* Ortega, 4 Wash. C. C. 531, Fed. Cas. No. 15,971; Kirland *v.* State, 43 Ind. 146, 13 Am. Rep. 386; Regina *v.* Day, 1 Cox. C. C. 207. The injury to the person by the impact of force coming from without, whether intentionally or negligently inflicted, may leave no external marks of violence, while most seriously affecting health, or possibly life itself. If the defendant was not bound "to anticipate, or to guard against an injurious result, which would only happen to a person of peculiar sensitiveness," it was required to protect the plaintiff from possible injuries attributable to its negligence. It is an over-refinement for the defendant to urge that her clothing was separable from her person, and that the resulting strain and shock when she sprang to avoid an anticipated danger was not a physical injury, which if her person had been even slightly burned must have been conceded. Cameron *v.* New England Tel. & Tel. Co., 182 Mass. 310, 312, 65 N. E. 385. But if the jury were satisfied, from her evidence, that while making the movement she wrenched the muscles of her side, and thereby suffered an external injury, accompanied with serious nervous shock, causing severe pain, they might treat her injuries, when assessing damages, as the direct result of the accident. Warren *v.* Boston & Maine R. R., 163 Mass. 484, 487, 40 N. E. 895; Gannon *v.* New York, New Haven & Hartford R. R., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833; Berard *v.* Boston & Albany R. R., 177 Mass. 179, 58 N. E. 586.

The first, third, and fourth requests were rightly refused, and the instructions were sufficiently favorable to the defendant.

Exceptions overruled.

BODEN *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk, May 17, 1910.)

[91 N. E. Rep. 879.]

Carriers—Carriage of Passengers—Who Are Passengers.—Where a passenger, in taking a train, knowingly disregards the provisions made for his convenience and safety, and instead of using the platform, chooses a course with which he is not familiar, and which he knows was not intended for his use, he becomes a trespasser, or at most a mere licensee, and the carrier's duty is only to refrain from wanton or reckless conduct that would put him in peril.

Carriers—Carriage of Passengers—Contributory Negligence of Passenger—Evidence—Sufficiency.—In an action against a carrier for injuries sustained while plaintiff was on his way to take a car about 150 feet away from the lighted platform intended for passengers, evidence held to show that plaintiff was not in the exercise of due care.

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Henry J. Boden against the Boston Elevated Railway Company. A verdict was ordered for defendant, and plaintiff excepted. Exceptions overrruled.

William P. Thompson, for plaintiff.
Endicott P. Saltonstall and *Sanford H. E. Freund,* for defendant.

KNOWLTON, C. J. The plaintiff took a train on the defendant's elevated railway to the Dudley Street terminal station. There he undertook to pass by transfer to a surface car of the defendant which came into the same station. From the platform on which passengers alight from the cars on the elevated railway, there were three steps down to a covered platform from which passengers take cars running out on some of the defendant's surface roads. This platform is 205 feet long and 21 feet wide, and the cars from the surface roads come up a gradual ascent from the street below, and pass around a curve like that of a horseshoe, and the track extends along by the side of this platform throughout nearly its whole length. The platform is well lighted and conveniently constructed for the use of passengers, and all the surface cars stop by the side of it to discharge and receive passengers. Extending off from this platform, adjacent to the upper part of the curve in the track for the surface cars, there was another narrow platform for the use of employees, constructed with the boards in the floor laid apart from each other, with spaces of about an inch between them, which platform was not covered, nor lighted in the

evening. Its width varied greatly, as it was built around the outer edge of the curved track. At a point 95 feet from the side of the covered platform there was a rise of about 6 inches, and the platform was narrowed about 2 feet, leaving an opening where the floor of the wider portion ended.

The accident happened at about half past 10 o'clock in the evening. The plaintiff left the elevated train, passed across the platform and down three steps to the covered platform. He wished to take a car for Mattapan. He knew the car would come around the curve and stop opposite the covered platform to receive passengers. Because he thought the number of passengers taking the car would be so large that he would not get a seat if he got upon the car in the ordinary way, he left the covered platform, and walked out into the darkness along the other platform a distance of 95 feet, and stepped off into the opening at the place where the platform was narrowed. The car for Mattapan which he had started to take was about 50 feet further on, around the curve. The night was dark, and the plaintiff testified that when he left the covered platform he walked "out into the utter darkness." He testified that he used this station "two or three times a day, back and forth," although "some days he did not go at all." He also testified that he was not familiar with the platform near where he fell, and that he was not looking where he was stepping.

The construction of the station, with its long and wide covered platform where the surface cars discharged and received passengers, and with the platform of a different kind, uncovered and having spaces between the boards of the floor, and leading out at right angles from the covered platform into utter darkness in the evening, with cars coming up and passing around before they reached the platform designed for passengers, showed plainly that passengers were not expected to go around the curve to meet cars coming in. There was no evidence of an invitation to passengers, express or implied, to go there. There was nothing to indicate that the platform around the curve was intended to be used by passengers leaving the cars or by passengers taking the cars. There was no evidence that any passenger ever left a car there. There was testimony that other persons, like the plaintiff, had sometimes gone out upon this platform to meet cars, with a view to increase the probability of their getting a seat, when there was a large number waiting to take the cars on the covered platform. But this was contrary to the plain indications of the purpose of the railway company. They went there, not in the exercise of their rights as passengers, but as trespassers, or at best as mere licensees.

The principle stated in Legge *v.* New York, New Haven & Hartford Railroad Company, 197 Mass. 88-90, 83 N. E. 367, 23 L. R. A. (N. S.) 633, is applicable to a passenger who

knowingly disregards the provisions made for his convenience and safety, and chooses a course with which he is not familiar, and which he knows was not intended for his use. In that case, the court, in speaking of the duty of a passenger to use the proper arrangements made for his exit, said: "If he knowingly fails to do so, and, without any invitation, expressed or fairly to be implied from the situation and arrangement of the station and grounds, leaves the way marked out by the defendant and proceeds to make his exit in some other way, he ceases from that moment to be a passenger and becomes a trespasser, or at most a mere licensee. He has stepped from the ægis by which, up to that moment, the law as to passengers covered him. Nor does it make any difference that he goes where others with the knowledge of the railroad company have gone before him, unless there is some invitation, express or implied upon the part of the company. Knowledge of such use, where proper arrangements have been otherwise provided, does not of itself amount to such invitation." See, also, Loweny *v.* Walker, 1 K. B. (1910) 173. Then follows a citation of cases. The defendant was under no obligation to provide a place for passengers where the accident happened, as if they were invited to use the horseshoe platform there. Its only duty was to refrain from wanton or reckless conduct that would put them in peril.

In going where he did and as he did, the plaintiff, upon his own testimony, was not in the exercise of due care He started to take a car which was about 150 feet away from the lighted platform intended for passengers, and he did this on a dark night, passing over a course which was not lighted and with which he was not familiar. He did not look to see where he was stepping. He did this knowing that he was not regarding the plans and arrangements made by the defendant for the accommodation of its passengers. He did it with no other purpose than to relieve himself from the inconvenience attendant upon the presence of a large number of other passengers. He knew the principal facts which created the risks attendant upon his conduct, and these were such as should have induced him to refrain from the exposure to danger which he voluntarily accepted. We are of opinion that there was no evidence that he was in the exercise of due care.

Exceptions overruled.

METCALF *v.* YAZOO & M. V. R. CO.

(Supreme Court of Mississippi, May 23, 1910.)

[52 So. Rep. 355.]

Carriers—Of Passengers—Commencement of Relation—Statutes.—Under Code 1906, §§ 4854, 4867, requiring railroads to maintain reasonably necessary depots and to keep rooms therein open for the reception of passengers at least one hour before the arrival of trains, an intending passenger may lawfully use the rooms therein for any necessary or convenient purpose in furtherance of his intention to become a passenger; and an intending passenger, who avails himself of a waiting room within a reasonable time before the arrival of the train, is a passenger, though his purpose is merely to place his hand baggage in the waiting room as a matter of convenience to himself and in furtherance of his ultimate object, and though he has a purpose to leave again before the arrival of the train on a matter of convenience, pleasure, or business.

Carriers—Passengers—Who Are.*—Where a railroad has opened its waiting room in a depot for the reception of passengers, and a person intending to take passage on a train shortly to arrive resorts to the depot for that purpose, the relation of carrier and passenger arises as a matter of law.

Carriers—Passengers—Who Are.—Where a person intending to take passage on a train went to the depot 15 minutes before the arrival of the train to deposit in the waiting room his satchel, his resort to the depot was for a lawful purpose and in furtherance of his intention to become a passenger, and the relation of carrier and passenger was created, though he intended to leave the depot to see a person on business.

Appeal from Circuit Court, Bolivar County; J. M. Cashin, Judge.

Action by J. B. Conly, prosecuted after his death by Harley Metcalf, as executor, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Shields & Boddie, for appellant.
Mayes & Longstreet, for appellee.

MAYES, C. J. In 1908 J. B. Conly instituted suit against the Yazoo & Mississippi Valley Railroad Company for the purpose of recovering damages for injuries alleged to have been

*For the authorities in this series on the question whether a person may be a passenger before he boards a train or car, see first foot-note of Philadelphia, etc., R. Co. *v.* Green (Md.), 34 R. R. R. 414, 57 Am. & Eng. R. Cas., N. S., 414.

sustained by him, some time in September of that year, by falling into an excavation made by the company around its depot at Duncan, Miss., which, it is claimed, was negligently left open without warning light or safety guard. Mr. Conly alleges that he fell while at the depot for the purpose of taking passage on a train, due about 10 or 15 minutes after he entered the depot, and about 7:20 p. m. After the institution of the suit Mr. Conly died, and the suit is prosecuted by the executor.

The facts are substantially as follows: Mr. Conly left Round Lake, Miss., in a buggy about 5 o'clock, and drove to the town of Duncan, intending, as it seems, to take passage on the 7:20 p. m. south-bound passenger train on defendant's road. After arriving at the town of Duncan he proceeded to the hotel to get supper. After supper, and 15 or 20 minutes before the train was due, he left the hotel for the depot, with his grip in his hand and a mileage book in his pocket, having in view the purpose of taking passage on the train when it should arrive. It was the double purpose of Conly to deposit his grip in the waiting room of the depot in preparation of his contemplated trip, and then to go over to the store of a Mr. Wynn, which was but a short distance from the waiting room, as he desired to speak to Mr. Wynn on a matter of business. Conly proceeded to the depot, and entered the waiting room safely, and after depositing his grip turned to go out to see Mr. Wynn, and as he stepped out of the door fell into an excavation in front of same, and sustained painful injuries, at least. It appears that the excavation was made by reason of the fact that the company was repairing its depot. The excavation seems to have been immediately in front of the waiting room entrance, and from three to five feet deep, and some two or three feet wide. Across this trench, and for the purpose of getting into the waiting room, some planks were placed leading into the door; but they were unguarded and without warning light. Conly said he could not see the excavation when he entered, because there was no light. As he entered, he says the light in the waiting room was shining in his eyes and blinded him, and when he came out the light was behind him, and the excavation so close to the door that, while it was bright enough to make the gravel walk visible, it did not light up this excavation. It is not our purpose to intimate how serious were the injuries Conly received. That question is left to the jury. The question before this court is simply whether or not the facts make out a case of liability on the part of the company. The court below gave a peremptory instruction to find for defendant, holding that Conly was not a passenger at the time of the injury, and from this action of the trial court an appeal is prosecuted by the executor.

Let us first review the statutes of the state on the subject of the railroad's duty in respect to its depots and waiting rooms.

By section 4854 it is made the duty of every railroad to establish and maintain such depots as shall be reasonably necessary for the public convenience; and by section 4867 it is made the duty of every railroad to keep rooms open for the reception of passengers at least one hour before the arrival, and one half hour after the departure, of all passenger trains. Thus it is that the law requires that the railroads shall have depots, and that they shall make them comfortable and accessible at reasonable times to intending passengers. It would be useless for the statute to require the railroads to keep rooms open for the reception of passengers an hour before the arrival of the train, unless intending passengers could make lawful use of the rooms, within that limit of time, for any necessary or convenient purpose which is in furtherance of the bona fide intention to become a passenger. This is the manifest purpose of the statute, and the very object of having the waiting room open is to receive intending passengers and their hand baggage. When an intending passenger avails himself of the convenience which the law has established for his benefit, and which the railroad must provide, within a reasonable time before the arrival of the train, his object being to facilitate and further his purpose to take passage, even though it be to place his hand baggage in the waiting room as a matter of convenience to himself and in furtherance of his ultimate object, such person, while on the depot grounds or in the waiting room, is a passenger, and entitled to all the protection of a passenger, though he have a purpose to leave again before the arrival of the train on a matter of convenience, pleasure, or business. To hold otherwise would place the rights of persons accepting the conveniences provided by law for their use in a precarious and uncertain condition under the law, and relieve railroads from a duty which they stand under to the traveling public, for which no sensible or just reason can be assigned. It is a matter of common knowledge that intending passengers use the waiting rooms for depositing their hand satchels, and such like, many minutes before a train is due to arrive. Some may loiter around the grounds and the platforms, while others may find it convenient and necessary to cross a street on a matter of business or pleasure; but because of this it is none the less the duty of a railroad to keep its grounds and rooms in a safe condition, both for the intending passenger who imprisons himself within the four walls of the waiting room and the passenger who is on the grounds for the purpose of relieving himself from the burden of his baggage in order that he may go out for some purpose, it being certain that both come to the depot for the ultimate purpose of taking a train.

It is argued by counsel for appellee, that, before there can arise the relation of carrier and passenger, there must not only

be an intent on the part of a person to become a passenger and avail himself of the facilities offered by the carrier for transportation, but there must be an express or implied acceptance by the carrier of the person so intending as a passenger. Many authorities are cited to sustain this proposition, and we find no fault with the law there announced; but the question is, What constitutes this acceptance? Must the person go to the agent of the carrier and formally announce his arrival and intention to take passage? Must the agent then and there formally accept such person, in order to establish the relation? Clearly no such formality is required, in view of the fact that it is the lawful right of every citizen to establish this relation, with or without the consent of the railroad. The true rule is that, when the railroad has opened its waiting room for the reception of passengers as required by law, and any person intending to take passage on the train next to come has resorted to the depot in lawful furtherance of that purpose and in a proper condition to be received as a passenger, there arises from these acts, as a matter of law, the relation of carrier and passenger.

The contention of counsel for appellee that the relation of carrier and passenger could not arise until after Conly had entered the depot grounds on his return from Wynn's store is unsound and too narrow. Conly had gone to the depot to deposit his satchel in the waiting room only 15 minutes before the arrival of his train. His resort to the depot was for a lawful purpose and in furtherance of his intention. The depot was open for the reception of passengers and for their convenience. If he had hunted up the agent, and told him that he contemplated taking the next train, and desired to place his baggage in the waiting room and go out to see Wynn, the agent would doubtless have told him that the waiting room was there for the full convenience of one situated as he was. He was making the very use of the waiting room that the railroad and the law designed should be made of it. Conly was no loiterer on the depot grounds. He was no idler or trespasser; but he was there on the lawful business of an intending passenger.

We have found no case precisely like the case now on trial, but in the note to the case of Alabama, etc., Ry. Co. *v.* Godfrey, 130 Am. St. Rep. 76, will be found many authorities discussing this subject and sustaining the principle here announced. In section 997, vol. 2, Hutchinson on Carriers, it is said: "It would be impossible to frame a clear, precise, legal definition of the word 'passenger,' which would embrace all its essential elements." In 6 Cyc. p. 536, it is said that the relation of carrier and passenger exists, as to railroad companies, "not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course."

The case of Andrews *v.* Y. & M. V. R. Co., 86 Miss. 129, 38 South. 773, is no authority for any question involved in this case. In the Andrews Case it is shown that Andrews went to the depot more than two hours before the train he desired to take was due. He went into the private office of the agent, and requested the privilege of doing some writing on account of his own affairs, thus going to the depot and making use of its private office as an office in which to transact some business of his own. While so engaged in his own business in the private office of the depot, the depot agent and Andrews got into a personal difficulty about a private matter, and the court stated in the opinion that Andrews had gone to the depot in order that he might have a comfortable and convenient place in which to transact his own business, and was not, therefore, a passenger; that Andrews was knowingly violating the rules of the company, and could not claim its protection under the facts of that case. But the very object of Conly's visit to the depot was in furtherance of his purpose to take passage. Everything he did while there was in accordance with the rules of the company, and he was merely availing himself of those facilities which the company had placed there for the use of passengers, and which, under the law and rules of the company, he had a right to use.

In view of what we have heretofore said, we deem it unnecessary to further discuss the questions argued on behalf of appellee.

Reversed and remanded.

WHITE *v.* MINNEAPOLIS & R. R. RY. CO.

(Supreme Court of Minnesota, May 27, 1910.)

[126 N. W. Rep. 533.]

Carriers—Injury to Freight—Liability for Negligence.—Defendant, although operating a meagerly equipped railway, assumed the duties of a common carrier of freight and passengers, and is liable for injuries caused by its negligence in the performance of its duties.

Carriers—Delay of Freight—Duty of Carrier.*—A carrier is not an insurer against damages to freight from changes in temperature, unless the circumstances in which the transportation is undertaken impose upon the carrier that obligation; but if, after acceptance of the freight, its transportation is delayed, the carrier must use reasonable care to protect it during the delay.

Carriers—Delay—Damages.—The evidence fairly presented ques-

*See note, 23 R. R. R. 193, 46 Am. & Eng. R. Cas., N. S., 193.

tions of fact for the jury, and, taking the charge as an entirety, the jury were properly instructed by the court.

(Syllabus by the Court.)

Appeal from District Court, Itasca County; B. F. Wright, Judge.

Action by R. E. White against the Minneapolis & Rainy River Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

R. J. Powell, for appellant.
W. E. Rowe, for respondent.

O'BRIEN, J. On November 29, 1905, plaintiff delivered to defendant for carriage a car load of vegetables. The vegetables were in an ordinary box car belonging to a connecting company, and at the time of the delivery were transferred from the tracks of that company to defendant's yard at Deer River. On the same day plaintiff had assembled a large crew of men at Deer River, for whom and his general camp supplies he desired passage to a point upon defendant's line of road where he was about to commence logging operations. About this time a portion of defendant's track crossing a swamp, or what is known in local parlance as a "muskeg," became submerged, ice formed above the rails, and traffic was suspended until a temporary track was constructed around the swamp. This occupied four days, and when the vegetables arrived at the point of destination they were found to be frozen. Plaintiff's first cause of action was for the value of such portion of the vegetables as were destroyed by freezing. By the second cause of action plaintiff sought to recover the wages paid the crew of men compelled to remain idle at Deer River and the cost of the board and lodging furnished them during that period. The jury gave plaintiff a verdict.

The complaint alleged the defendant was a railway corporation engaged in the carriage and transportation of freight and passengers for hire. The answer admitted this allegation, so that, while it is quite apparent from the record that the defendant company controls a rather meagerly equipped railway, it must, under the pleadings, be held to the responsibilities of a common carrier. The plaintiff introduced evidence to show that the freight was unconditionally delivered by him to the defendant for transportation, while the defendant claimed it fully informed the plaintiff of the sinking of its track, and received the freight upon condition that it would be required to transport it only when its roadway was repaired sufficiently to enable it to operate trains upon it, and that it did not undertake to care for the perishable freight in the meantime. There was testimony that the temperature lowered during the time the

freight was awaiting transportation, and plaintiff made some attempt, by maintaining an oil stove in the car, to keep the vegetables from freezing, so that under all of the evidence it became a question for the jury to say what the contract was and whether or not the defendant carried out its undertakings.

The defendant insists that the sinking of its track was an overwhelming and unexpected occurrence which it could not prevent, and that it was therefore relieved from responsibility by a catastrophe which is to be attributed to the act of God. The plaintiff, upon the other hand, claimed that the track was submerged because of the insufficiency of the roadbed supporting it. The court correctly instructed the jury as to the character of a catastrophe which is to be attributed to the act of God, and, while we greatly doubt that the evidence in this case would support a finding that the sinking of defendant's track was without fault or negligence upon its part, that question is not before us, because of the adverse finding upon that point necessarily implied by the verdict of the jury.

Defendant assigns as error that portion of the charge in which it is stated that the defendant became an insurer of the freight intrusted to it from the time it was received, and that it was its duty to deliver the property to the plaintiff at the point of destination in as good condition as it was when received. This is a correct statement of abstract law, but, as applied to this case, would, if standing alone, be so insufficient as to necessarily be held erroneous. A railway, by its contract to safely carry, does not insure perishable freight against the effect of temperature encountered by it during the period ordinarily required for its transportation, unless the circumstances under which the contract of carriage is made are such as to imply an undertaking to that extent on the part of the carrier. Brennisen *v.* Pen. Ry. Co., 100 Minn. 102, 110 N. W. 362. And this would be particularly true in such a case as this, where the assumption would be that the contract was to haul the property in the car transferred to defendant's yard. Therefore, if this car load of vegetables had been promptly transported, we would have difficulty in sustaining the verdict, even though the vegetables were frozen during transit. But the car remained in the exposed yards for four days, during all of which time defendant must be held to have had possession of it and its contents, and, while the evidence shows that plaintiff took some steps to keep the vegetables from freezing, this did not relieve the defendant from its duty to use reasonable care to protect the freight it had accepted. The court correctly instructed the jury as to defendant's duties during this delay, and, taken as a whole, the charge was free from prejudicial error, particularly in view of the fact that no inconsistency in it was called to the attention of the court during the trial.

With reference to the second cause of action the court instructed the jury that it was the duty of defendant to transport the plaintiff and his men within a reasonable time, and that if the defendant negligently delayed doing so the plaintiff was entitled to recover the damages which he sustained by reason of such delay. The rule for computing such damages was not stated in the charge, but evidence was received as to the aggregate wages paid the men and the amount paid for their board and lodging during this time. That, we think, was the correct rule, and the verdict rendered appears to be within an amount to be so arrived at.

The evidence as to the payment by plaintiff of the freight charges, and of conversations with defendant's agent in charge of its business at the place of shipment, was properly received.

Order affirmed.

CLYDE COAL CO. *v.* PITTSBURG & L. E. R. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 596.]

Carriers—Carriage of Freight—Breach of Contract—Damages.*—Where a railroad company contracted with a coal company to furnish cars at a point, and failed to do so, the company, in an action for breach of the contract, cannot recover for profits that would have accrued on a subsequent contract made by it to deliver a certain number of tons of coal per day to a buyer, if the railroad company had no knowledge when it agreed to deliver the cars that the coal company contemplated such a contract.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Clyde Coal Company against the Pittsburg & Lake Erie Railroad Company. Judgment for plaintiff granting inadequate relief, and plaintiff appeals. Affirmed.

At the trial the following offer was made:

"Counsel for plaintiff now offer to prove by the witness on the stand, and other witnesses: That early in January, 1903, the plaintiff company entered into a contract with the defendant company, through its vice president, Col. J. M. Schoonmaker, under and by virtue of which contract the Pittsburg & Lake Erie Railroad Company agreed to supply cars to a hoist or coal elevator, which the plaintiff company proposed to erect on a siding which they had leased at Bunola station, a station upon

*See second foot-note of Williams *v.* Atlantic C. L. R. Co. (Fla.), 33 R. R. R. 158, 56 Am. & Eng. R. Cas., N. S., 158.

the line of a branch road controlled by the defendant company. That the contract or arrangement bound the Pittsburg & Lake Erie Railroad to supply at said siding the share or proportion of the cars for distribution which would be supplied to such sidings were they connected with a coal mine upon said railroad, having the rating or capacity of the plaintiff company's mine. That upon the faith of this contract, and with the knowledge of the defendant company, the plaintiff proceeded to erect their hoist at the siding at Bunola station, in the manner provided in the contract. That upon completion of the same, to wit, on May 2, 1903, they called upon the defendant company for a supply of cars, and six cars were in fact placed upon said siding loaded with coal by the plaintiff company and shipped away, in the manner provided by the contract. That prior to this date the plaintiff company had entered into a contract with the Pittsburg Coal Company for the delivery of coal to that company in the manner set forth in Exhibit No. 2, and at a price of $1.47 per ton, being a price which showed a profit over the cost of supplying coal at Bunola station. That this contract was exhibited to the vice president and general manager of the defendant company in the conversations early in May, during which the plaintiff company was endeavoring to get cars for the completion of its deliveries under its contract with the Pittsburg Coal Company. That, with the knowledge of this contract, the defendant company broke its agreement with the plaintiff company, and refused to deliver any further cars beyond the first six cars, as mentioned heretofore in the offer.

"The plaintiff further offers to show accurately the cost of supplying coal to cars at Bunola siding, the cost of transportation, and the price which would be received for such deliveries in accordance with the contract, and to show the number of cars which they should have received, in accordance with the schedule of distribution of cars by the Pittsburg & Lake Erie Railroad Company had they been registered as provided in the contract they had with that company, and by these means to show the actual loss sustained by the plaintiff company in not receiving the cars for shipment in accordance with the terms of the contract. This for the purpose of showing with reasonable certainty the profits which have been lost to the plaintiff by reason of the breach of contract sued on in this case."

The objection and ruling of the court thereon are as follows:

"Objected to as incompetent, irrelevant, and immaterial, and identical with the offer heretofore made upon which the court has already ruled.

"Objection sustained and bill sealed for plaintiff."

"Counsel for plaintiff futher offer to show by this witness, and other witnesses: That at the time the contract made in this case, and sued upon, was entered into, there was great

scarcity of coal, and the same was selling at a high price. That every effort was being made to get coal upon the market, and that it was well known to the officials of the defendant company, as well as to all other persons engaged in or connected with the transportation and sale of coal, that coal was being sold at a very high profit over the mining rate or cost of production. That, outside of the said contract shown in this case, the plaintiff company could have marketed all its coal, had it received the cars promised it by the defendant company at a considerable profit over and above the cost of supply, and that this fact was known at the time of the entering into of said contract by the officers of the defendant company, and was also well known by them at the time of the breach of said contract. This for the purpose of showing with reasonable certainty the profits which have been lost to the plaintiff company by the breach of the contract, as claimed in this case, and that such profits were within the contemplation of the parties at the time the said contract was made."

The objection and ruling of the court thereon are as follows:

"Objected to as incompetent, irrelevant, and immaterial.

"Objection sustained, and bill sealed for plaintiff."

"Counsel for plaintiff now offers to show by the witness on the stand, and other witnesses, the execution of the contract. Exhibit No. 2 in this case, with the Pittsburg Coal Company, providing for the delivery to that company of 500 tons of coal per day, at $1.47 per ton, f. o. b. at Bunola station, up to September 30, 1903. That the defendant company had a sufficient supply of cars to give to the plaintiff company 40 per cent. of the capacity of its hoist, which would have enabled the plaintiff to deliver about 240 tons per day, which would have earned a profit of 62 cents per ton over the cost of producing and loading the coal at Bunola station. That the defendant company, after delivering six cars on the siding, without legal reason or excuse, and after full knowledge on its part of the making and of the terms of the contract of plaintiff company with the Pittsburg Coal Company, above referred to, refused to make further deliveries and broke its contract with the plaintiff to supply them with cars on the same basis as other mines situate upon its railroad, being the contract sued on in this case. That as a result of said breach the plaintiff company was unable to make the deliveries provided for in the contract with the Pittsburg Coal Company, and lost the profits which would certainly have been made thereon by such deliveries. That the mine of the plaintiff company, being a river mine, and having no other means of transporting coal than the Monongahela river and its water connections, could make no shipment during the months covered by the Pittsburg Coal Company contract, to wit, from May 2, 1903, to September 30, 1903; the said river and its con-

nections being unnavigable for coal deliveries during the said season or period. That the coal mined or taken out during said period was stacked or piled on the plaintiff company's property, and, as well as the unmined coal, which would have been required to fill the Pittsburg Coal Company contract, remained unsold and undelivered until the ensuing winter, when the stage of water in the river enabled the plaintiff company to resume regular deliveries from its mine by water. That in the meantime the price of coal had fallen from the price fixed by the Pittsburg Coal Company contract, $1.47 per ton, to the price of $1 and less per ton, at which price the coal which the plaintiff would otherwise have delivered to the Pittsburg Coal Company was sold to other parties. The plaintiff offers the contract with the Pittsburg Coal Company in connection with the facts offered to be proved in the foregoing offer, to show the difference in price between the sales made under the contract and the sales of the same coal, as subsequently made to other parties, as the measure of damage in this case, being the loss by it of the profits which would certainly have been made had the contract with the defendant company been observed, and had it been permitted to make the deliveries therein provided for. (Objected to. Objection sustained. Exception.)"

Verdict and judgment for plaintiff for $5,195.42. Plaintiff appealed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Thomas Patterson and *Geo. M. & M. J. Hosack,* for appellant.
George E. Shaw, for appellee.

MESTREZAT, J. In 1903, and prior thereto, the plaintiff company was the owner of about 1,000 acres of coal situate on the Monongahela river, in the Fifth Pool, near Fredericktown, Washington county. The plaintiff was operating the coal with a fully equipped mine in 1903 and had a capacity for mining and shipping 1,200 tons per day. The mine was not located upon the line of any railroad, and the plaintiff had to rely entirely upon water transportation for shipping its coal. During a period of about six months in each year, the plaintiff was unable, by reason of the low stage of water, to ship coal from Pittsburg to points south along the Ohio river, but could ship its coal in barges and flats on the Monongahela river from the mine to Bunola, a village situate in the Third Pool of the Monongahela river on the Pittsburg, McKeesport & Youghiogheny Railroad, which is operated by the defendant company. Desiring to ship coal to various places in Pennsylvania, Ohio, and other states, which it could not reach by water transportation, and also wishing to have facilities for shipping its coal by rail-

road, the plaintiff company in January, 1903, entered into a verbal contract with the defendant railroad company, by which it was agreed that if the plaintiff erected a hoist at Bunola, by means of which, after having transported its coal in barges and flats on the Monongahela river from Fredericktown to Bunola, it would transfer the same to the defendant's cars, the plaintiff should receive cars for the shipment of its coal, and in the matter of car service it should be treated the same as a coal mine located directly upon the line of the defendant's railroad. Relying upon the performance of the contract by the defendant, the plaintiff, in February, 1903, leased a strip of land at Bunola for a period of three years, together with the use of a railroad siding for cars in which its coal was to be loaded for shipment. The plaintiff company also erected a hoist at Bunola for the purpose of lifting its coal out of the boats anl placing it on board the cars to be furnished by the defendant company. The construction of the hoist was finished about May 2, 1903, and the defendant company furnished six cars on the Bunola siding to the plaintiff for transporting its coal, but thereafter declined and refused to furnish any more cars. The plaintiff then brought this action to recover damages for the breach of the contract.

The defendant company denies that it entered into any contract or agreement to furnish cars to the plaintiff company at Bunola. On the trial of the cause this was the only question submitted to the jury, which found in favor of the plaintiff. This finding established the existence of the contract as alleged by the plaintiff. The trial judge instructed the jury that, if there was a contract, the measure of damages would be "the cost of this hoist less its value as dismantled and sold, and the rental loss," which, it was agreed, was $5,067.38. The plaintiff claims that the court erred as to the measure of damages, and that question is raised in the assignments which allege error in sustaining the objection to certain offers of evidence made by the plaintiff on the trial.

In the statement, the plaintiff company avers that, relying upon its contract with the defendant, it, on or about April 2, 1903, entered into a written agreement with the Pittsburg Coal Company, by which the plaintiff agreed to ship to the coal company all the 1¼-inch coal it could load from barges at the hoist at Bunola from the date of the contract to September 30, 1903, at the price of $1.47 per ton; and further that, should the plaintiff be able to load any lake coal after September 30th and up to the close of the season of lake navigation for the year 1903, all coal that it should be able to so load should be shipped at the above price. The coal company agreed to take 500 tons of coal per day. In view of this contract, it is averred, the plaintiff increased the force of its mine, made changes in the mine

equipment, and expended considerable money in preparing to mine and handle the coal required by its contract with the Pittsburg Company. The statement avers that, by reason of defendant's refusal to furnish the cars for transporting the coal to its destination, the plaintiff lost 62 cents per ton profit on each ton of coal which it sold to the Pittsburg Company and which it was prepared to ship and deliver to that company in its proportion of cars which the defendant had agreed to furnish it. The aggregate amount of the loss is averred in the statement, which the plaintiff claims is, in addition to the cost of the hoist and rental, the measure of its damages in this case.

As stated by the learned counsel for the appellant, the sole question to be determined is whether or not the plaintiff was entitled to recover the profits which it would have made from its contract with the Pittsburg Coal Company. This question is raised by the fifth assignment, in which it is alleged that the court erred in excluding the plaintiff's offer of evidence. That offer was to show that the plaintiff had entered into the contract with the Pittsburg Company as set out in the statement; that the defendant had a sufficient supply of cars to give to the plaintiff company 40 per cent. of the capacity of its hoist and would have enabled the plaintiff to have delivered about 240 tons per day, which would have earned a profit of 62 per cent. per ton above the cost of producing and loading the coal at Bunola siding; that, as a result of the breach of the contract, the plaintiff was unable to make the delivery provided for in the contract with the Pittsburg Company, and lost the profits which would certainly have been made by such delivery.

The facts of the case at bar bring it within the class of cases in our own and other jurisdictions in which it is held that profits arising from a subsequent contract which, though made on the faith of the original contract and capable of definite ascertainment, are not recoverable in an action for the breach of the original contract. The general rule is well stated in the leading English case (Hadley *v.* Baxendale, 9 Exch. 341; s. c., 5 Eng. Rul. Cases, 502), where it is held that "the amount of damages recoverable from a carrier is such as would naturally result from the breach of the contract, whether as the ordinary consequence of such a breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." This case is cited, and the rule is approved, in our own cases of Fleming *v.* Beck, 48 Pa. 309, and Wolf *v.* Studebaker, 65 Pa. 459. The same doctrine is announced by Strong, J., in Adams Express Company *v.* Egbert, 36 Pa. 360, 364 (78 Am. Dec. 382), wherein it is said: "It is doubtless true that, in all actions for the breach of a contract, the loss or injury for which damages are sought

to be recovered must be a proximate consequence of the breach. A remote or possible loss is not sufficient ground for compensation. There is no measure for these losses which have no direct and necssary connection with the stipulations of the contract, or which are dependent upon contingencies, other than the performance of the contract, and which are therefore incapable of being estimated. With no certainty can it be said that such losses are attributable to the wrongful act or omission of him who has violated his engagement. But, on the other hand, the loss of profits or advantages, which must have resulted from a fulfillment of the contract, may be compensated in damages, when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for, and have been in the contemplation of the parties when it was made."

The leading American case on the subject is Masterton *v.* Mayor of Brooklyn, 7 Hill (N. Y.) 61, 68, 42 Am. Dec. 38. It is there held that the measure of damages for a breach of an executory contract includes loss of profits growing immediately out of the contract which would have been realized from its full performance, but not loss of profits or other damages arising out of collateral undertakings entered into on the faith of the contract. Nelson, C. J., delivering the opinion of the court, says inter alia: "It has, accordingly, been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach." The chief justice shows by a quotation from Pothier that the same rule obtains in the civil law. The case is cited and approved in Massachusetts in Fox *v.* Harding, 7 Cush. 516, 523, where it is held that, in an action for the breach of a special contract, the plaintiff may recover as part of his damages such profits as would have accrued to him from the contract itself, if it had been performed, but not those which he would have realized from other contracts entered into for the purpose of fulfilling such special contract. Bigelow, J., delivering the opinion of the court, says: "If the plaintiffs had offered to prove, in addition to this, that, in consequence of the breach of the contract by the defendants, they had lost other contracts by which they would have realized large profits, and which they had entered into for the purpose of fulfilling their contract with the defendants, the evidence would have been wholly inadmissible, because such collateral undertakings were not necessarily connected with the principal contract, and cannot be reasonably supposed to have been taken into consideration when it was entered into." The Masterton and Fox Cases are cited and followed in Hoy *v.* Gronoble, 34 Pa. 9, 75 Am. Dec. 628. The doctrine announced in Hadley *v.* Baxendale is recognized and declared well established by Endi-

cott, J., delivering the opinion in Harvey *v.* Connecticut & Passumpsic Rivers R. R. Co., 124 Mass. 421, 26 Am. Rep. 673.

From these and other adjudicated cases the doctrine may be regarded as settled that for the breach of a contract damages may be recovered for loss of profits, the direct and immediate fruits of the contract itself and ascertainable with reasonable certainty, when they are the natural result of such breach, or which, under the circumstances, the parties may have contemplated at the execution of the contract as the probable result of its breach; but damages for the loss of profits for the violation of a contract may not be recovered where they are uncertain, remote, or speculative, or when they grow out of a subsequent collateral or subordinate undertaking which was entered into upon the faith of the principal contract.

The contract in the present case, by which the defendant agreed to furnish cars to the plaintiff, was made in January, 1903, and its breach occurred in the following May. The contract between the plaintiff and the Pittsburg Coal Company was made in April, 1903, more than two months after the execution of the agreement between the plaintiff and the defendant, but before the defendant company had refused to furnish more cars and had thereby committed a breach of its agreement. Damages arising from profits which the plaintiff might have made on its contract with the Pittsburg Coal Company were manifestly not in contemplation of the parties when the contract between the plaintiff and the defendant was made in January, 1903. The coal company contract was not then in existence, and, so far as the defendant company knew, it was not even contemplated. It was a collateral undertaking between the plaintiff and the coal company of which the defendant company had no knowledge at the time it executed the contract with the plaintiff, and therefore the defendant could not have anticipated damages resulting to the plaintiff company by reason of the loss of profits on the coal company contract.

It is not sufficient, to impose liability on the defendant company, that it had knowledge of the contract between the plaintiff and the Pittsburg Coal Company prior to the breach of the contract between the plaintiff and the defendant. This is an action upon the original contract, and the defendant is liable for only such profits as would naturally result from a breach of that contract and were in contemplation of the parties at the time the contract was executed. The action is not brought upon the original contract as subsequently modified after the defendant had notice of the Pittsburg Coal Company contract. At the time the original contract was entered into, it does not appear that the defendant was notified that the plaintiff had any contract with any person or company to furnish coal, or that the contract was executed on the part of the plaintiff with the view of fur-

nishing any certain or definite amount of coal to any one, or had any agreement to do so. The Pittsburg Coal Company contract, and any other agreements of a similar kind which the plaintiff may have intended to make, if any, were wholly unknown to the defendant company at the time it entered into the contract with the plaintiff on which this action is brought. It is clear, therefore, we think, that, conceding the plaintiff's ability to show definitely the profits which it would have made on the Pittsburg Coal Company contract, yet it is manifest that the parties did not contemplate their loss as a consequence of a breach of the contract, and under all the authorities they cannot be recovered in this action.

The controlling question in the present case did not arise in Wilson *v.* Wernwag, 217 Pa. 82, 66 Atl. 242. In that case the damages arose out of the contract between the parties, and there was no claim for a loss of profits on a collateral or subordinate contract. The loss there was the direct loss caused by the breach of contract between the parties, and therefore the damages resulting from the breach were in contemplation of the parties at the time they made their agreement. Here the loss of profits arises out of a collateral undertaking which the defendant company could not anticipate and of which it had no knowledge at the time it entered into the agreement with the plaintiff.

The assignments of error are overruled, and the judgment is affirmed.

SUMRELL *et al. v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, March 31, 1910.)

[67 S. E. Rep. 585.]

Carriers—Bill of Lading—Evidence—Presumption.*—A bill of lading raises the presumption that goods were delivered to the carrier for shipment in good order.

Evidence—Suppression of Evidence—Bill of Lading—Possession of Carrier—Evidence.—Where a bill of lading was filed with defendant, with a claim for damages to goods shipped, the bill of lading being in defendant's possession, it devolved upon defendant to introduce it in evidence if desired.

Carriers—Damage to Goods—Amount—Question for Jury.—Where plaintiff testified that 98 cents was the damage to a case of goods in shipment and there was no direct evidence in contradiction, and he relied for corroboration on the facts that he filed his claim for 98 cents, and that defendant did not contest the claim, but paid it

*See extensive note, 26 R. R. R. 305, 49 Am. & Eng. R. Cas., N. S., 305.

to another, while defendant's evidence was the itemized bill from plaintiff's vendor filed with the claim, which showed the price of a dozen bottles of olives was $2.15 less 10 per cent. and the claim for loss of 6 bottles, whether the damage was for the amount claimed or for 97 cents as claimed by defendant was for the jury.

Appeal from Superior Court, Lenoir County; O. H. Allen, Judge.

Action by G. W. Sumrell and another against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Rouse & Land, for appellant.
E. R. Wooten, for appellees.

CLARK, C. J. This was an action begun before a justice of the peace to recover 98 cents for damages to goods shipped to plaintiffs over the defendant's road, together with the penalty of $50 given by Revisal, § 2634, for failure to adjust and pay the claim for such damages within 60 days after it was filed.

It was in evidence that plaintiff's claim for 98 cents damages was filed with the defendant April 22, 1908, and was allowed and paid by it, but to another party, May 8th following. This party subsequently refunded the 98 cents to the defendant. The plaintiff, not being paid, brought this action April 15, 1909. The jury found the damages to be 98 cents, and, the filing of the claim for that amount at the date stated and nonpayment to the plaintiff not being controverted, the court entered judgment for $50.98 as provided by Revisal, § 2634.

The court properly refused defendant's prayer for a nonsuit, and also to charge that there was no evidence that the goods were delivered in good order to the defendant. The bill of lading raised the presumption. Mitchell *v.* Railroad, 124 N. C. 239, 32 S. E. 671, 44 L. R. A. 515; Manufacturing Co. *v.* Railroad, 128 N. C. 284, 38 S. E. 894, 83 Am. St. Rep. 675. The bill of lading was filed by the plaintiff with its claim, and, being in the defendant's possession, it devolved upon it to introduce it in evidence, if desired. The plaintiff testified "98 cents was the damage to the olives, the whole case of olives." There was no direct evidence to contradict this. The defendant relied upon the fact that the itemized bill from the vendors filed with the plaintiff's claim for damages (which claim was for 98 cents) set out that the cost price of one dozen bottles olives in Norfolk was $2.15, with 10 per cent. off, and plaintiff only claimed that six bottles were lost. The defendant therefore asked the court to charge: "If the jury believe the evidence, the value of the goods lost or damaged was 97 cents."

It does not appear who paid the freight, nor whether the bot-

tles were all of the same size, nor whether the value at destination was the same as in Norfolk. The only direct testimony was that of the plaintiff who testified that "98 cents was the damage to the olives, the whole case," and he relies, as corroboration, on the fact that he filed his claim for 98 cents, and that the defendant did not contest that being the correct amount, but paid the 98 cents to another party. Whether the damage was 98 cents or 97 cents was therefore for the jury, and his honor correctly "left it to the jury to say, from all the evidence, what was the amount of the damages." The jury, after argument from both sides, and upon the evidence, found that it was 98 cents. This finding, being for the "full amount of the claim," entitles the plaintiff to recover the penalty, and we cannot say there was no evidence to support the finding.

This seems to be a hard case. But the plaintiff's counsel reminds us that the statute was passed on account of the large number of small claims of this kind which, while aggregating large sums, were each too small to be sued on, and hence usually went unpaid. We do not know the facts surrounding this case. Upon the issues found, the judgment was correct.

No error.

PITTSBURG, C., C. & ST. L. RY. CO. *v.* MITCHELL.

(Supreme Court of Indiana, April 26, 1910.)

[91 N. E. Rep. 735.]

Commerce—Interstate Commerce—Regulation by Congress.—Interstate commerce can be regulated exclusively by Congress, but the regulation is within and for the benefit of the states and their citizens.

Courts—Jurisdiction—Federal Statutes.—Where a federal statute gives a penalty to one aggrieved without specifying a remedy for its enforcement, a state court has jurisdiction to enforce it by appropriate action, and before jurisdiction lodges in the federal court exclusively, it must be a federal case arising under the cause of action stated from the questions involved.

Courts—Jurisdiction—Federal Statutes.—Where the complaint in an action in a state court against a carrier for delay of an interstate shipment counts on a common-law liability, and contains the averments required by Burns' Ann. St. 1908, §§ 3918-3920, relating to actions against carriers, the court has jurisdiction to enforce, in rebuttal of a defense set up under the bill of lading, the provisions of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) § 20, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), making a carrier liable to the holder of the bill of lading for any loss caused by it or any connecting carrier.

Pittsburg, etc., Ry. Co. *v.* Mitchell

Carriers—Carriage of Freight—Contracts.*—A stipulation in a bill of lading of the initial carrier, limiting its liability to loss occurring while the property is in its possession, is simply declaratory of the common law.

Carriers—Carriage of Freight—Contracts.—A contract by the initial carrier to carry freight to its usual place of delivery at destination if on its road, otherwise to deliver to another carrier on the route to the destination, binds the initial carrier to carry beyond its own line and deliver the goods, and, where it undertakes to transport to the destination and receives pay for the whole distance, the liability attaching on it to deliver continues throughout the whole transit, and connecting carriers are its agents in carrying out the contract.

Carriers—Regulation of Rates—Statutes.—The interstate commerce act allows differential and discriminative rates so long as they are not unjust or do not operate unfairly, and the essence of the act is that whatever the rate is it shall be the same to all persons similarly situated.

Carriers—Carriage of Freight—Contracts Limiting Liability.†—The common-law right to contract with respect to the value of an article to be transported, on the character and value of which a rate may depend, and the right to contract against loss beyond the carrier's control, are unaffected by the interstate commerce act, but under Burns' Ann. St. 1908, § 3919, the contract must be fairly made on a sufficient consideration after the shipper has been given an opportunity to choose between the common-law right and rate and the special contract rate and limited liability.

Carriers—Carriage of Freight—Contracts Limiting Liability.†—Where there was no pretense that a shipper was given a bona fide opportunity to ship at a fair and reasonable rate, without limitation of common-law liability, or, as required by Burns' Ann. St. 1908, § 3919, to make a limitation of liability good, on any consideration for such limitation, or that he was offered more than one rate, but it merely appeared that the contract limiting the liability was made fairly and understandingly by the shipper as governing the shipment and the terms and conditions under which the property was received for transportation, the contract limiting liability was not enforceable against the shipper.

Carriers—Carriage of Freight—Loss—Liability.‡—Where there is an intervening human agency which contributes to a loss of freight, the burden is on the carrier to show that it was prevented from safe delivery by the act of God, and not from delay or negligence in transportation.

*See foot-note of Brunk *v.* Ohio & K. Ry. Co. (Ky.), 29 R. R. R. 279, 52 Am. & Eng. R. Cas., N. S., 279; foot-note of Moody *v.* Southern Ry. Co. (S. Car.), 28 R. R. R. 706, 51 Am. & Eng. R. Cas., N. S., 706.

†See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

‡See note on following page.

Pittsburg, etc., Ry. Co. v. Mitchell

Carriers—Carriage of Freight—Loss—Liability.‡—Where the delay in the transportation of perishable freight was wholly unaccounted for, the carrier must show that the injury to the freight due to heat or freezing was not due to its negligence or delay.

Constitutional Law—Due Process of Law.—The interstate commerce act fixing primary responsibility on the initial carrier is not invalid as taking private property without due process of law in violation of the fourteenth amendment of the federal Constitution, because the act fixes the liability of the connecting carrier, and provides for enforcing the obligation, especially when the initial carrier selected the connecting carrier.

Commerce—Regulation—Validity.—The interstate commerce act, fixing primary responsibility on the initial carrier, and also fixing the liability of the connecting carrier, and providing for enforcing the same, is a regulation of commerce, and the act controls interstate shipments, and makes an interstate shipment one carriage as between the carriers.

Appeal from Circuit Court, Pike County; E. A. Ely, Judge.

Action by Daniel J. Mitchell against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John L. Rupe, L. P. Newby, and *F. J. Newby,* for appellant. *Eugene H. Bundy* and *N. Guy Jones,* for appellee.

MYERS, J. Appellee brought an action against appellant, alleging that on the 1st day of November, 1906, appellant, controlling and operating a line of railroad in the state of Indiana from Indianapolis, Ind., to Cincinnati, Ohio, and other lines of railroad within and without the state of Indiana, was a common carrier for hire, engaged in interstate commerce and held itself out as such common carrier of freight and passengers from Dunreith, Ind., to New Smyrna, in the state of Florida, on which day he delivered to appellant at its station of Dunreith, Ind., a car load of apples to be by it carried and transported to New Smyrna, and, as a consideration for the carriage of the apples to their destination, appellee paid to appellant in advance the full freight and charges demanded by appellant. Appellee avers that, by reason of unreasonable delays in transportation, the apples became spoiled in transit and worthless, and demanding judgment for $1,400. Appellant answered by general denial and by a special paragraph setting up as a defense that appellant's own line only extended to Cincinnati, Ohio, and no nearer New Symrna, Fla., and that it made the shipment under a written contract or bill of lading, set out, alleged to have been entered into fairly and understandingly by

‡See extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298.

appellee, as governing the shipment, and the conditions under which the property was received for shipment, by which the property was to be carried to Cincinnati over its own line and there delivered to a connecting carrier, that it carried the property without delay, and delivered it in good order to the connecting carrier. The contract recites the receipt of the apples consigned to appellee at New Smyrna, Fla., and some of its conditions are that its terms and conditions shall run to the benefit of any carrier, and that no carrier "shall be liable for any loss thereof, or damage thereto by causes beyond its control, * * * or by * * * changes in weather, heat, frost, wet or decay. * * * No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route * * * the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place of shipment under this bill of lading." To this answer appellee replied by general denial, and by special plea that the written contract was excuted without consideration. The cause was tried by a jury, and a general verdict returned for $1,200, with answers to interrogatories. Over motion for judgment on the interrogatories and answers and for a new trial judgment was rendered.

The first error urged here is overruling the motion for a judgment in favor of appellant upon the answers to the interrogatories. These answers show that the shipment was made under the written contract; that appellant's own line extended to Cincinnati only, where it delivered the apples in good order to a connecting carrier; that the damage to appellee accrued after their delivery to the connecting carrier; and that there was no consideration for the written contract or bill of lading. Appellant's argument travels upon the theory that, as the written contract by its terms limits its liability to loss occurring on its own line, it is discharged under the facts found. Closely allied to this contention is the further insistence that in the opening statement of counsel for appellee to the jury that the act of Congress known as the Hepburn Amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1163]) to section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) rendered the bill of lading void as a defense was error and prejudicial. The question was presented by motion to the court to have the statement withdrawn from the jury. The question was presented again at the close of the evidence by motion to dismiss the action for want of jurisdiction, and upon the motion for a new trial under the assignment of error in giving instructions, and that the verdict was contrary to law, upon the theory that the interstate commerce act has no application, except in cases arising under that act, or brought in the

federal courts, and that no other courts have jurisdiction to enforce its provisions. We are thus confronted with the question of jurisdiction. The complaint it will be noted counts upon a common-law liability, and also contains the averments required by the act of April 15, 1905 (Acts 1905, c. 47; Burns' Ann. St. 1908, §§ 3918, 3919, 3920). Upon its face no statute is invoked except the act of 1905. Upon its face there is jurisdiction of the subject-matter. The federal statute is only invoked incidentally, as a bar to the defense sought to be interposed by the bill of lading. We are not able to discover that the precise question has received the attention of the Supreme Court of the United States, but strong analogies may be found in the pronouncements of that court. The acts of Congress in force relating to subjects over which Congress has power to legislate for the state are expressly declared by the statute to be the law of the state. Burns' Ann. St. 1908, § 236. Interstate commerce is within the exclusive regulation of Congress, but it is regulation within and for the benefit of the states and their citizens. "The laws of the United States are laws of the several states, and just as much binding on the citizens and the courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and within its jurisdiction a paramount, sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state concurrent as to place and persons, though distinct as to subject-matter. * * * So rights, whether legal or equitable, acquired under the laws of the states, may be prosecuted in the United States courts, or in the state courts competent to decide rights of the like character and class, subject, however, to this qualification: That, where a right arises under a law of the United States, Congress may if it sees fit give to the federal courts exclusive jurisdiction. * * * This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise, by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different, and partly concurrent."

Claflin v. Houseman (1876) 93 U. S. 130, 136, 23 L. Ed. 833. Pratt v. Paris, etc., Co. (1897) 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, is instructive and to the point.

The plaintiff in error sued the defendants in error in a state court in assumpsit on the common counts for the price of a patented machine, a common-law action. The defendant answered that the patent was void, and an infringement on prior patents, and they had no right to use it, and the consideration had failed. The question arose on the trial when, upon the court admitting evidence tending to show that the patents were invalid as infringements, plaintiff in error contended that the court thereby assumed jurisdiction of a patent case. The Supreme Court, speaking by Mr. Justice Brown, said: "The state court had jurisdiction of the parties and the subject-matter as set forth in the declaration, and that it could not be ousted of such jurisdiction by the fact that incidentally to one of these defenses the defendant claimed the invalidity of the patent. To hold that it has no right to introduce evidence upon this subject is to do a wrong, and deny it a remedy. Section 711 does not deprive the state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading, be it a bill, complaint, or declaration, sets up a right under the patent laws, as a ground for a recovery." In order that jurisdiction shall lodge in the federal courts exclusively, it must be a federal case arising under the cause of action stated from the questions involved. Riverside Mills *v.* Atlantic &, etc., Co. (C. C.) 168 Fed. 987; Osborn *v.* Bank of U. S., 9 Wheat. 824, 6. L. Ed. 204.

It is urged that jurisdiction is in the federal courts by virtue of section 9 of the interstate commerce act, reading, in part, as follows: "Sec. 9. That any person, or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for, he or they will adopt." This section was enacted in 1887. 3 U. S. Comp. St. 1901, p. 3159. If the case stood upon that section alone, it might be that there is room for argument that the language excludes state jurisdiction. But the amendment of section 20 of June 29, 1906, introduces into the law an element wholly

lacking under section 9, supra, when the latter was enacted. The amendment is as follows: "That any common carrier, railroad or transportation company, receiving property for transportation, from a point in one state, to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof, for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed. Provided: That nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action, which he has under existing laws. That a common carrier, railroad or transportation company, issuing such receipt of bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof." U. S. Comp. St. Supp. 1909, p. 1167. It is the injection of section 9 into the cause which appellant urges as disclosing the want of jurisdiction in the court below. The proviso of section 20 is an express recognition of the act as being cumulative, and in addition to existing rights, either at common law or under state statutes, and an express reservation of the right to maintain any action which might be maintained irrespective of the act, and, as it seems to us, expressly confers concurrent jurisdiction upon the state courts, that the general law obtains, and that only in cases where the amount is in excess of $2,000 can the federal courts have jurisdiction, and that is the view of the Supreme Court of Kentucky. Louisville, etc., Co. *v.* Scott (1909) 118 S. W. 990.

Referring to section 22 of the act as amended in 1889, providing "and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies" (U. S. Comp. St. 1901, p. 3171), the Supreme Court of the United States in Texas Pacific Co. *v.* Abilene Co. (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, speaking by Mr. Justice White, said: "The clause is concerned alone with rights recognized in, or duties imposed by, the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act." This amendment of

section 22 in 1889, of course, had a purpose as disclosed by the decision quoted above in making clear, concurrent jurisdiction if it had not before existed, though the phrase in section 9 "of competent jurisdiction," as we understand it, refers to such jurisdiction as then existed in the federal District and Circuit Courts, concurrent with the state courts. It has been expressly held in many of the states that the provisions of section 20 of the interstate commerce act are the subject of cognizance and enforcement by the state courts, and by the Appellate Court, we think correctly, in this state. Pittsburg, etc., Co. *v.* Wood, 84 N. E. 1009; Midland Valley Co. *v.* Hoffman Co. (Ark.) 120 S. W. 380; Galveston, etc., Co. *v.* Crow (Tex. Civ. App.) 117 S. W. 170; Chicago, etc., Co. *v.* Clements (Tex. Civ. App.) 115 S. W. 664; Galveston, etc., Co. *v.* Piper (Tex. Civ. App.) 115 S. W. 107; St. Louis, etc., Co. *v.* Grayson, 89 Ark. 154, 115 S. W. 933; Murray *v.* Chicago, etc., Co. (C. C.) 62 Fed. 24; Southern, etc., Co. *v.* Crenshaw, 5 Ga. App. 675, 63 S. E. 865; Georgia R. R. Co. *v.* Creety, 5 Ga. App. 424, 63 S. E. 528; Brantley Co. *v.* Ocean Co., 5 Ga. App. 844, 63 S. E. 1129.

The complaint here is a common-law action. No federal question is presented by it. The shipment was interstate. The interstate commerce act is a part of the laws of this state, and enforceable in its courts when rights under it, and given by it, arise as incidents of a trial.

Passing to the second question involved, viz., the effect of the contract of shipment upon limitation of liability, the adjudications are numerous that the contract is invalid, owing to the provisions of the interstate commerce act. The bill of lading seeks to limit liability as to each carrier en route in many respects. It seeks first to limit liability for loss or damage occurring while the property was in the possession of appellant. That limitation was simply declarative of the common law. The complaint alleges an undertaking to transport to and deliver at New Smyrna, Fla. We cannot presume that New Symrna is beyond its own line. The answer contains a contract to "carry to its usual place of delivery at said destination, if on its own road, otherwise to deliver to another carrier on the route to said destination," but avers that New Smyrna is beyond its own line, so that at one and the same time it was attempting to restrict liability so far as it was itself concerned, and also undertaking to transport to a fixed destination, and making a contract limiting the liability and contracting for the benefit of every carrier en route upon the identical terms and conditions as in case of its own carriage. The whole scope of the contract then is an undertaking to carry beyond its own line, and deliver the fruit, and having thus undertaken transportation to the destination, and received pay for the whole distance, with a contract running equally to its own benefit, and that of any carrier en

route, the liability attaching upon delivery to it for carriage continues throughout the whole transit, and the connecting carrier, or carriers en route, employed in the transportation, are the agents of the initial carrier in carrying out the particular contract. Chicago, etc., Co. *v.* Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810; Railway Co. *v.* Reiss, 183 U. S. 621, 22 Sup. Ct. 252, 46 L. Ed. 358; Bank of Ky. *v.* Adams, 93 U. S. 174, 23 L. Ed. 872; Smeltzer *v.* St. Louis Co. (C. C. 1908) 158 Fed. 649; Virginia Coal Co. *v.* Railroad Co., 98 Va. 776, 37 S. E. 310; Johnson *v.* Railway Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 464; Ireland *v.* Railroad Co., 105 Ky. 400, 49 S. W. 188; Eckles *v.* Railway Co., 112 Mo. App. 240, 87 S. W. 99; Halliday *v.* Railroad Co., 74 Mo. 159, 41 Am. Rep. 309; Jennings *v.* Railway Co., 127 N. Y. 438, 28 N. E. 394; Condict *v.* Railroad Co., 54 N. Y. 500; Galveston Co. *v.* Allison, 59 Tex. 193; Texas Ex. Co. *v.* Dupree, 2 Willson Civ. Cas. Ct. App. (Tex.) 318; Texas, etc., Co. *v.* Scrivener (1884) 2 Willson Civ. Cas. Ct. App. § 328; Cincinnati, etc., Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Merchants' Dispatch *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Lawson on Carriers, § 235; 6 Cyc. 479, 481. If, as we believe, the interstate commerce provision is cognizable and enforceable in the state courts in a common-law action in rebuttal of a defense sought to be made under a bill of lading, it follows that the provision limiting liability to loss occurring while on appellant's own line is invalid. See section of statute quoted above invalidating the alleged contract. Kansas City Co. *v.* Carl (Ark.) 121 S. W. 932; Louisville, etc., Co. *v.* Scott (Ky.) 118 S. W. 990; Galveston Co. *v.* Crow (Tex. Civ. App.) 117 S. W. 170; Galveston Co. *v.* Piper (Tex. Civ. App.) 115 S. W. 107; St. Louis Co. *v.* Grayson (Ark.) 115 S. W. 933; Smeltzer *v.* St. Louis Co. (C. C.) 158 Fed. 649; Travis *v.* Wells Fargo Co. (N. J. Sup.) 74 Atl. 444; Vigouroux *v.* Platt (1909) 62 Misc. Rep. 364, 115 N. Y. Supp. 880; Shidlovsky *v.* Mallory Co. (1908) 60 Misc. Rep. 67, 111 N. Y. Supp. 778; Greenwald *v.* Weir, 59 Misc. Rep. 431, 111 N. Y. Supp. 235; Hutchinson on Carriers, § 235, 240.

It is suggested that the Indiana statute is contrary to the interstate commerce act, in that the latter recognizes but one rate. We do not so understand that act. Differential and discriminative rates are allowable so long as they are not unjust or do not operate unfairly. Poor *v.* Chicago, etc., Co., 12 Interest. Com. R. 418; Hutchinson on Carriers, § 538. The essence of that act is that whatever the rate it shall be the same to all persons similarly situated.

It is next urged that the special contract releases liability for losses beyond the carrier's control, which it is urged is the same thing as the act of God, or the public enemy, and specifically

that there is a release of liability for "loss due to changes in weather, heat, frost, wet or decay," and that the evidence shows loss from heating or freezing, or both. There is no pretense that appellee was given a bona fide opportunity to ship at a fair and reasonable rate without limitation of common-law liability, or upon any consideration for such limitation, or that he was offered more than the one rate. The pleading goes no further than to allege that the contract was made "fairly and understandingly by said plaintiff, as governing the shipment and the terms and conditions under which said property was received for transportation." The allegations not only fall far short of compliance with the statute, or bring the case within the common law, but are conclusions. We are not to be understood as holding that there may be no limitation of liability, nor does the interstate commerce act or the construction under it so declare. The common-law right to contract with respect to the value of an article to be transported upon the character and value of which a rate may depend and the right to contract against loss beyond the carrier's control are unaffected by the interstate commerce act, though the contract must be fairly made upon a sufficient consideration after the shipper has been given an opportunity to choose between the common-law right and rate, and the special contract rate and limited liability. Burns' Ann. St. 1908, § 3919; Cleveland, etc., Co. *v.* Hollowell (1909) 172 Ind. 466, 88 N. E. 680; Lake Erie Co. *v.* Holland, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; Travis *v.* Wells Fargo Co., supra; Greenwald *v.* Weir, supra; Hart *v.* Penna Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; In re Released Rates (1908) 13 Interst. Com. R. 550; Elliott on Railroads, 1504, 1510. For the like reason, this right would also extend to the question here urged as to the contract limiting the liability to the value of the apples at the place and time of shipment, instead of the place of delivery as at common law. Chicago Co. *v.* Katzenbach, 118 Ind. 178, 20 N. E. 709. But, as shown, the answer does not present that question.

The same thing is true as to the question of heat, or frost, or both. But it is claimed that heat and frost are acts of God. Without stopping to inquire into that question, it is well settled that, if there is an intervening human agency which contributes to the loss, such as freezing, the burden is on the carrier to show that it was prevented from safe delivery by the act of God, and not from delay or negligence in transportation. Blackstock *v.* Railroad Co., 20 N. Y. 48, 75 Am. Dec. 372; Weed *v.* Panama Co., 17 N. Y. 362, 72 Am. Dec. 474; Elliott on Railroads, 1455, 1457; Hutchinson on Carriers, 287, 288, 289, 297-307. The complaint charges the loss as occurring from unreasonable delay in transportation, and the facts disclose that a reasonable time for the carriage was from 5 to 7 days, and that

19 days were consumed in the transportation, and this delay is wholly unaccounted for. If the loss was due to heat or freezing, and they can be said to be acts of God, it was still incumbent upon appellant to show that it was not due to the negligence or delay in transporting, or, in the language of the cases, an intervening human agency. The constitutionality of the interstate commerce act as to the question of fixing primary responsibility upon the initial carrier is challenged as taking private property without due process of law, in requiring such carrier to look to the connecting carrier, in violation of the fifth amendment, and section 1 of the fourteenth amendment to the federal Constitution, and because it is not a regulation of commerce, but requiring one carrier to answer for the default of another irrespective of solvency or insolvency in the latter, with whom it has no contract relations, and over which it has no control, with the right in the shipper to route the shipment as he pleases, and provides no adequate indemnity, or means of enforcing the demand against the delinquent carrier. As to the last point it may be said that the same act which fixes the liability on the initial carrier fixes it on the connecting carrier, and also provides for enforcing the obligation. Whether the fact that the shipper has the right of selecting the route is material or not, there is nothing to indicate any such course in this case; and it will be presumed that appellant selected a solvent agent, and is in no situation to raise the question in this case. The voluntary making of a through rate constitutes a common control, management, or arrangement for a continuous carriage or shipment. Interstate Commerce Com. *v.* L. & N. Ry. (C. C.) 118 Fed. 613; United States *v.* Seaboard Co. (C. C.) 82 Fed. 563.

The fact that appellant undertook a through shipment is quite indicative of co-operative relations with other carriers. As to the act not being a regulation of commerce, it is urged that it does not attempt to regulate carriage by the initial carrier or prescribe the method of conducting business by any carrier. It seems to us that those very facts if true commend it, for it leaves to carriers the methods of carriage and the general conduct of their business. The act as a whole certainly does control interstate shipments in many respects, and as between initial and other carriers makes it one carriage. The validity of the act as applied to the due process of law clauses of the Constitution has several times been declared. Riverside Mills *v.* Atlantic, etc., Co. (C. C. 1909) 168 Fed. 987; Smeltzer *v.* St. Louis Co. (C. C. 1908) 158 Fed. 649; Galveston, etc., Co. *v.* Crow (Tex. Civ. App. 1909) 117 S. W. 170; Galveston, etc., Co. *v.* Piper (Tex. Civ. App 1909) 115 S. W. 107; Greenwald *v.* Weir (1908) 59 Misc. Rep. 431, 111 N. Y. Supp. 235.

Errors are predicated upon instructions given on request of

appellee, and in refusing to give those requested by appellant. The instructions given are not objected to as to any specific matter, but that they generally presented an erroneous theory of the law applicable to the case, as here shown by the insistence of appellant, which theory as we conclude was correct. Those requested by appellant and refused present its theory, which as we view it was erroneous. No good purpose can therefore be subserved in setting out the instructions.

We conclude that the judgment should be affirmed; and it is so ordered.

FLORENCE & C. C. R. CO. *v.* JENSEN.

(Supreme Court of Colorado, May 2, 1910.)

[108 Pac. Rep. 974.]

Appeal and Error—Presentation of Objections in Trial Court—Filing Replication.—Though a replication appears by the record to have been filed after the beginning of the trial, a judgment for plaintiff will not be reversed, where defendant failed to object or except to the filing of the replication out of time or to move to strike it from the files.

Pleading—Necessity of Replication—Waiver.—By going to trial and introducing evidence in support of his answer defendant waives the failure of the plaintiff to file a replication.

Carriers—Carriage of Goods—Delivery to Consignee—Burden of Proof.—Where a carrier delivers the goods to a person not named in the bill of lading as the consignee, but who claimed to represent the true owner, the burden of proof is on the carrier to show the true ownership of the goods, and that the person to whom the goods were delivered had authority to receive them.

Carriers—Bill of Lading—Transfer by Delivery.*—The delivery of an unindorsed bill of lading constitutes a good symbolical delivery of the goods represented by the bill of lading only when such was the intent and purpose of the parties.

Carriers—Carriage of Goods—Persons to Whom Delivery May Be Made.—Where a consignee named in a bill of lading was arrested and thrown into jail, and the bill of lading was taken from his person by the jailer, and the bill of lading was never assigned or indorsed by the consignee, a delivery of the goods by the carrier to a person who by some means obtained possession of the bill of lading from the jailer did not discharge it from liability, though it acted in good faith in surrendering the property.

*See generally, first foot-note of McMeekin *v.* Southern Ry. Co. (S. Car.), 32 R. R. R. 441, 55 Am. & Eng. R. Cas., N. S., 441.

Florence & C. C. R. Co. *v.* Jensen

Appeal from District Court, Teller County; Louis W. Cunningham, Judge.

Action by S. Jensen against the Florence & Cripple Creek Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Schuyler & Schuyler and *Gunnell & Chinn,* for appellant.
Huff & Ferguson, for appellee.

WHITE, J. Jensen, the appellee, instituted this suit against appellant, the Florence & Cripple Creek Railroad Company, to recover damages for the value of certain ore alleged to have been delivered by the plaintiff to the defendant, and by the latter wrongfully converted to its own use. The defendant is a corporation, engaged in carrying freight, for hire, between certain points in this state. Plaintiff delivered to the defendant a car load of valuable ore, which the latter was to transport and deliver to a certain smelter at Pueblo known as the "Eiler's plant." The defendant, upon receipt of the ore delivered to plaintiff a bill of lading, in which plaintiff was designated as the "shipper" and the Eiler's plant as the "consignee" of the ore. The bill of lading expressly recited that the ore was received "to be transported over the Florence & Cripple Creek Railroad and associate companies, and delivered to consignee at destination (if such destination is located on said company's line), or to the next connecting carrier (if the destination of such ore is beyond said company's line), for such connecting carrier to deliver the said ore to consignee at the destination." About two days after plaintiff delivered the ore to the defendant and received the bill of lading, he was, for some reason, not disclosed by the record, arrested and thrown into the county jail at Cripple Creek, and, while so incarcerated, his pockets were searched by a deputy sheriff and the bill of lading taken from him. Immediately thereafter the defendant received through the mail a letter or order from an organization known as the Cripple Creek Mine Owners' & Operators' Association, to divert the car of ore in question, and deliver it to the Eagle Ore Company at Victor. This letter was accompanied by the bill of lading; the same, however, not being assigned. How the bill of lading came into the possession of the mine owners' association is not disclosed. The defendant failed and refused to transmit the ore to Pueblo, or deliver it to any of its associate or connecting lines for that purpose, but without the knowledge or consent of the plaintiff complied with the request of the mine owners' association, changed the destination of the ore, and delivered it to the Eagle Ore Company at Victor, and it was thereby wholly lost to plaintiff. Defendant contends that plaintiff was never at any time the owner, or the agent of the owner,

of the ore or any part thereof; that plaintiff's possession was at all times wrongful and unlawful; that the Cripple Creek Mine Owners' & Operators' Association, having notified the defendant that it represented the owner of the ore, and had the right to control the same, and having presented the bill of lading, and ordered the destination of the ore changed from the Eiler's plant at Pueblo to the Eagle Ore Company at Victor, and the defendant having complied with such order, was thereby relieved from its obligation to plaintiff to deliver the ore to the Eiler's plant. Neither the answer nor the evidence discloses the particular owner or owners of the ore for whom the Cripple Creek Mine Owners' & Operators' Association claimed to be the agent. On the contrary, the only persons appearing, from the evidence, to have any right or ownership whatsoever in the ore, were the plaintiff and consignee named in the bill of lading. The cause, by agreement, was tried to the court without the intervention of a jury, resulting in a finding and judgment for plaintiff, from which defendant prosecutes this appeal.

The taking of evidence was commenced on April 13th. The replication appears to have been filed on April 14th, and defendant insists that the replication, not having been filed by order of court, cannot be considered, and that the allegations of the answer were, therefore, admitted and are conclusive. It is argued that, under the allegations of the answer, the bill of lading had been properly transferred by delivery, and that defendant transported the ore in question according to the order of the holder of the bill of lading, and, therefore, discharged its full duty as a common carrier.

There is no merit in defendant's contention. No objection, no ruling of the court, or exception to the filing of the replication, appears in the record. The matter does not appear to have been presented to, or passed upon by, the trial court in any way whatsoever. Moreover, no motion was made to strike the replication from the files, and, under the circumstances of this case, we will assume that the replication was properly filed. We will not reverse a judgment upon a point which the trial court was given no opportunity to pass upon, and where the objection, had it been called to the court's attention, might have been obviated. Cone *v.* Montgomery, 25 Colo. 277, 280, 53 Pac. 1052; Harrison *v.* Carlson, 45 Colo. 55, 60, 101 Pac. 76. Besides, it clearly appears that the allegations in the answer are, in effect, only a denial of the allegations of the complaint. But were it otherwise, the defendant, by going to trial, and introducing evidence in support of its answer, treated the defense as though it had been controverted, and thereby rendered it unnecessary to file a replication. Schecter *v.* White, 41 Colo. 219, 221, 92 Pac. 700. Before the defendant could relieve itself of its obligation to plaintiff, it must have complied with its con-

tract, or have been excused therefrom in some way recognized by law. Having delivered the property, not to the consignee, but to another claiming to represent the true owner, it devolved upon defendant to show who such owner was, and the authority of the assumed agent to act in the premises. Jensen *v.* Eagle Ore Co., 107 Pac. 259.

The defendant contends, however, that, as a matter of law, this obligation was discharged when it delivered the ore upon the order of the holder, and received the bill of lading; that it was not in fault in delivering the ore to the Eagle Ore Company for the reason that the possession of the bill of lading by the mine owners' association was, in effect, an assignment of the ore to that organization, and invested it with the right to demand and receive the ore. We are referred to three authorities which are claimed to support this view. An examination of them, however, shows that the doctrine announced is that a delivery of the shipper's "receipt without assignment, but with intent that the title to the goods for which it was given or an interest therein should be thereby transferred, would be effectual to accomplish the transfer intended." In Weyand *v.* Atchison, Topeka & Sante Fè Railway Company, 75 Iowa, 573, 578, 39 N. W. 899, 902 (1 L. R. A. 650, 9 Am. St. Rep. 504), it is said: "The cases * * * and the general conclusions of the court which made them we think go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties."

It is true the bill of lading is a symbol of ownership of the goods described therein. In a sense it stands in the place of the goods. However, if the goods described in the bill of lading "be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them or from whom they were stolen. Why then should the sale of the symbol or mere representation of the goods have such an effect?" Shaw *v.* Railroad Company, 101 U. S. 557, 565, 25 L. Ed. 892.

It is, perhaps, safe to say that, if the person in whose favor a bill of lading is written delivers it unindorsed, it constitutes a good symbolical delivery of the goods it represents only when such was the intent and purpose of the parties. In the case at bar there was no delivery of the bill of lading by the party in whose favor it was written, the Eiler's plant; nor was there a delivery by the party who caused it to be written, the plaintiff herein. Nor was there an intent on the part of any one having any interest whatsoever in the bill of lading to change the relation of the parties to the property in question. The fact that the mine owners' association presented the bill of lading to the defendant was not sufficient to overcome the presumption,

which the terms of the bill of lading raised, that the consignee, the Eiler's plant, was the owner of the goods. Such presumption is well established. Cary et al. *v.* Williams et al., 107 Pac. 219; Congar *v.* Galena & Chicago U. R. R. Co., 17 Wis. 492.

The contract with the defendant required it to deliver the goods to the Eiler's plant. The unindorsed bill of lading presented by the mine owners' association was evidence that the contract was still in force, and that Jensen's rights to have the property delivered in accordance with the contract were unimpaired. The delivery to the Eagle Ore Company was in no wise authorized and was made by defendant at its own risk.

It is immaterial that the delivery was secured through mistake or fraud, or the defendant, acting in good faith, was imposed upon. 6 Cyc. 472. However, as a matter of fact, it appears that defendant knew, or had reason to know, when it diverted the goods to the Eagle Ore Company, that it was doing so without the consent of plaintiff or the consignee.

It is clearly evident that the judgment is right, and it is, therefore, affirmed.

Judgment affirmed.

STEELE, C. J., and GABBERT, J., concur.

ATLANTIC COAST LINE R. CO. *v.* COACHMAN.

(Supreme Court of Florida, March 4, 1910. Headnotes Filed May 21, 1910.)

[52 So. Rep. 377.]

Constitutional Law—Due Process of Law—Equal Protection of Laws.—The provisions of chapter 5618, Acts 1907, are not confined to railroads alone, but include all common carriers, thus making a classification in accordance with the requirements of the Constitution as to due process of law and the equal protection of the laws.

Constitutional Law—Equal Protection of Laws.—The statute (chapter 5618, Acts 1907) may not be said to offend against the equal protection clause of the state Constitution (Bill of Rights, § 1), or the inhibition of article 14 of the federal Constitution, merely because it permits a recovery of interest and attorney's fees by the plaintiff shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit.

Constitutional Law—Equal Protection of Laws.—It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state, but it is sufficient to satisfy the constitutional requirement of equal protection of the law if it implies equally and uniformly to all persons similarly situated.

Atlantic Coast Line R. Co. v. Coachman

Railroads—Legislative Control.—Since railroads are created by the state for quasi public purposes and are, therefore, affected by a public interest, the Legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated, and subject of course to the constitutional restrictions against the impairment of vested rights, denial of the equal protection of the laws, or due process of law.

Constitutional Law—Police Power—Subjects of Regulation.—The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare.

Carriers—Regulation—Legislative Power.—The subject-matter of chapter 5618, Laws 1907, providing for a recovery of 50 per cent. interest and reasonable attorney's fees from common carriers for failure to pay claims for any freight or express lost or damaged within 60 days, meets the test of constitutionality.

Constitutional Law—Construction to Avoid Unconstitutionality.—A liberal rule of construction should be applied when the constitutionality of a statute is questioned, and every reasonable doubt should be resolved in favor of the validity of the statute assailed. The court should, in deference to the legislative department of the government, uphold a statute alleged to be unconstitutional, unless it is clearly made to appear beyond a reasonable doubt that the statute is unconstitutional.

Carriers—Settlement of Claims—Penalty for Failure—Reasonableness.—This court cannot say beyond a reasonable doubt that the penalty of 50 per cent. per annum interest on the principal sum of a claim for freight or express lost or damaged by a common carrier allowed by the provisions of chapter 5618, Laws 1907, for failure to pay said claim within 60 days from its filing with or presentation to said common carrier, is so exorbitant and unreasonable as to render the statute unconstitutional.

Carriers—Penalties—Reasonableness—Discretion of Legislature.—The reasonableness of a penalty for the failure to perform a public duty is primarily for the judgment of legislators, and courts will not interfere with the discretion of the Legislature in this regard as long as it keeps within the fair and reasonable scope of its powers. If such liabilities be considered inexpedient or illogical, the court cannot say the Legislature had transcended its power.

Carriers—Injury to Live Stock—Action—Plea of Not Guilty—Facts Put in Issue.—Under a plea of not guilty, the contention that the testimony does not show that the consignee of live stock was the agent of the plaintiff, as alleged to be in the declaration, cannot be considered, as this allegation is merely one of the facts stated in the inducement of the declaration, and such fact was not put in issue by the plea.

Atlantic Coast Line R. Co. *v.* Coachman

Appeal and Error—Harmless Error—Refusal of Special Pleas.—The action of the referee in refusing to allow the defendant to file additional pleas during the trial of the case, if error, was without injury, as the defendant was permitted to introduce evidence to support the matters set up in the additional pleas proffered.

Appeal and Error—Injury to Stock in Transit—Actions—Question for Referee.—In a suit against a railroad company for injuries to live stock, the question whether one of the animals was thrown down in the car and injured by the negligent moving of the car is one of fact for the referee acting as the jury.

Carriers—Contract Fixing Value of Shipment—Validity.*—Where the shipper and the carrier fairly enter into a contract whereby the parties agree on a valuation of the property, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract will be upheld as simply fixing the rate of freight and liquidating the damages, a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight he receives, and also of protecting himself against extravagant and fanciful valuations.

Carriers—Responsibility for Freight—Presumption.†—In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute; and, if lost under circumstances rendering the carrier liable by the general rule of law, it must respond, unless it can show that there was a contract, or a special acceptance equivalent to a contract, which exempts it from the ordinary liability of common carriers. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts.

Carriers—Limiting Common-Law Liability—Presumptions.—Contracts limiting the common-law liability of carriers are not favored by the courts. Exemption from liability will not be presumed, but must be found clearly expressed in the contract.

Carriers—Carriage of Freight—Rates—Effect of Rule of Carrier or Published Schedule.—If by a rule of the carrier or a published schedule of tariff rates its liability is fixed by the rate of freight paid, and for the purpose of obtaining a certain rate of freight the shipper reports to the carrier a valuation on live stock shipped, having notice or actual knowledge of these terms at the time or before the delivery of the stock by him to the carrier to be transported and assenting thereto, the liability of the carrier is fixed by such agreement. If, however, the shipper has no notice of the rule or tariff

*See foot-note of Winslow Bros. Co. *v.* Atlantic C. L. Co. (N. Car.), 33 R. R. R. 752, 56 Am. & Eng. R. Cas., N. S., 752.

†See note, 26 R. R. R. 334, 49 Am. & Eng. R. Cas., N. S., 334, extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

rates of the carrier, and does not assent thereto, the rule is different.

Carriers—Carriage of Stock—Shipment at Risk of Carrier or Shipper—Option of Shipper.—Under the rules and regulations of the Railroad Commission of this state prescribing the maximum valuation in the shipment of horses and mules of $75 each for a certain released rate, and for every increase of 100 per cent. or fraction thereof in valuation there shall be an increase of 50 per cent. in rate, the shipper has the option to ship at his own or the carrier's risk, and he will not be bound, in the limit of his recovery, by the payment of the release rate, unless it be shown that he knew the rate paid was a released rate, and there was a fair meeting of the minds of the shipper and the carrier that, by payment of the released rate, the recovery of the shipper would be limited to a certain maximum sum clearly agreed upon.

Appeal and Error—Injury to Stock in Transit—Action—Question for Referee Acting as Jury.—Where the evidence is not so clear as to forbid any other inference than that the shipper consented to a specified valuation, the question must be left to the referee's determination acting as a jury in a trial of the case.

Carriers—Injury to Stock—Failure to Settle Claim—Actions—Attorney Fees—Construction of Statute—"Amount Recovered."—The maximum sum allowed by the statute as a reasonable attorney's fee, in a suit against a carrier upon a claim for freight or express lost or damaged, where the carrier has failed to pay said claim in 60 days after its presentation, is 15 per cent. on any amount recovered greater than the sum of $100. The "amount recovered" means the amount of the claim recovered, and not that amount plus the 50 per cent. per annum interest also allowed by the statute.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Suwannee County; J. F. Harrell, Referee.

Action by B. P. Coachman against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition that a remittitur be made.

Doggett & Smith and *J. B. Johnson,* for plaintiff in error.
Roberson & Small and *F. L. Rees,* for defendant in error.

PARKHILL, J. The defendant in error sued the plaintiff in error in the circuit court for Suwannee county for loss and damage occasioned by the railroad company in the negligent and careless transportation of horses and mules belonging to the plaintiff.

By agreement of the parties, the cause was referred to J. F. Harrell, Esquire, a practicing attorney of the court, for trial.

The finding of the referee, upon a plea of not guilty, was as follows:

"I, J. F. Harrell, to whom the above-stated cause was hereto-

fore referred as referee by the judge of the circuit court in and for Suwannee county, Fla., for trial, as such referee do hereby find upon the evidence taken before me for the plaintiff B. P. Coachman, and assess his damage at $450. I further find that plaintiff is entitled to the further sum of $225, or 50 per cent. interest on the above amount under the statute.

"I further find that the plaintiff is entitled to the further sum of $200 as attorney's fees."

Afterwards, in accordance with an order made by the referee on a motion for a new trial, the plaintiff entered a remittitur for the sum of $98.75. Thereupon a final judgment for $776.25 was entered by the referee in favor of the plaintiff and against the defendant.

On writ of error the defendant below contends that the statute authorizing the award of interest and attorney's fees herein is unconstitutional, because it offends against the equal protection clause of the state Constitution and the inhibition of article 14 of the Constitution of the United States.

The provisions of chapter 5618, Laws 1907, under which recovery of interest and attorney's fees herein was had, are as follows:

"Section 1. That it shall be the duty of all common carriers operating within this state, and they are hereby required when any person files with, or presents to, them or any station agent of said common carrier to be filed, his claim for any freight or express lost or damaged by said common carrier, or for any overcharge made by such common carrier on any freight or express, to pay the said claim within sixty days from its filing with, or presentation to, said common carrier or any station agent of such common carrier.

"Sec. 2. That should any common carrier fail to comply with the provisions of section one (1) of this act, then the said common carrier making such failure shall be liable to the claimant for the amount of his claim and fifty per cent. per annum interest on the principal sum of said claim from the date of the filing of the same with, or presentation of the same to, the common carrier or any station agent of such common carrier, and when the said claimant shall bring suit and recover judgment for his claim against said common carrier, he shall be allowed the said fifty per cent. per annum, in addition to the principal sum of said claim, and the same shall be allowed in the verdict giving him judgment; here provided, however, that the claimant shall not recover and have judgment for the said fifty per cent. per annum, unless he recovers judgment for a sum which fixes the principal sum of said claim at an amount greater than the amount which said common carrier had offered and tendered to the claimant in settlement of his claim before the expiration of said sixty days in which the said common carrier is required to pay such claims under the provisions of section one (1) of this act.

Sec. 3. That any common carrier who fails to comply with the provisions of section one (1) of this act, shall, in the event that the claimant shall prevail in an action to recover on his claim, be liable for a reasonable attorney's fee and it shall be the duty of the court to allow the claimant such reasonable attorney's fee, which shall be fixed by the court, not to exceed fifteen dollars, if the amount recovered does not exceed one hundred dollars, and not to exceed fifteen per cent. on any amount recovered greater than the sum of one hundred dollars."

In Seaboard Air Line Ry. *v.* Simon, 56 Fla. 545, 47 South. 101, 20 L. R. A. (N. S.) 126, we held that, in providing for the regulation of settlement for goods lost in transit by "any person, firm, or corporation operating any railroad in this state," a subject applicable alike to all common carriers of goods (chapter 5424, Acts 1905), made a separate classification of persons, firms, or corporations operating railroads that is not based upon legal or natural, practical and reasonable differences in conditions with reference to the subject regulated, and violated in this respect the constitutional guaranties of due process of law and the equal protection of the laws. To the like effect is the holding of the Supreme Court of the United States in Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

The provisions of chapter 5618, Acts 1907, however, are not leveled against railroads alone, but include all common carriers, thus making a classification in accordance with the requirements of the Constitution as to due process of law and the equal protection of the laws.

The statute will not be said to offend against the equal protection of the state Constitution (Bill of Rights, § 1), or the inhibition of article 14 of the federal Constitution merely because it permits a recovery of interest and attorney's fees by the shipper if he succeeds, and secures no such right to the carrier in the event it prevails in the suit. The shipper and the carrier are not similarly situated. The shipper assumes the discharge of no duty to the public. He injures no one. And so the statute applies to the carrier—to all carriers similarly situated—and places its penalty or burden upon the carrier and not upon the shipper, because the carrier only is within the sphere of its operation. This court, therefore, has held, as not in conflict with the state or federal Constitutions statutory provisions for attorney's fees when judgment is rendered in favor of the plaintiff in the enforcement of mechanics' liens (Dell *v.* Marvin, 41 Fla. 221, 26 South. 188, 45 L. R. A. 201, 79 Am. St. Rep. 171); also, in case of recovery for live stock killed (Jacksonville, T. & K. W. Ry. Co. *v.* Prior, 34 Fla. 271, 15 South. 760); also, in suits upon policies issued by insurance companies (Tillis *v.* Liverpool & L. & G. Ins. Co., 46 Fla. 268, 35 South. 171, 110 Am. St. Rep. 89; Hartford Fire Ins. Co. *v.* Redding, 47 Fla. 228, 37 South. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118).

It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state, but it is sufficient to satisfy the constitutional requirement of equal protection of the law if it applies equally and uniformly to all persons similarly circumstanced. Wright *v.* Hart, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338.

We think, too, the subject-matter of this statute is within the power of the Legislature, or comes within the limits of constitutionality.

From considerations of public policy, the differences between the private and common carrier have led to rules respecting the duty of the latter which do not apply to the former. The common or public carrier of goods exercises a sort of public office, and his business, therefore, is affected with a public interest. Munn *v.* People of Illinois, 94 U. S. 113, 24 L. Ed. 77.

Since railroad companies are created by the state for quasi public purposes, and are thereby affected by a public interest, the Legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated, and subject of course to the constitutional restrictions against the impairment of vested rights, denial of the equal protection of the laws, or due process of law.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare as well as those designed to promote the public safety or the public health. Chicago, B. & Q. R. Co. *v.* People of State of Illinois ex rel. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; Lake Shore & M. S. Ry. Co. *v.* State of Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702.

The police power includes legislative authority to make regulations reasonably necessary or conducive to the public welfare. State ex rel. Milwaukee Medical College *v.* Chittenden, 127 Wis. 468, 107 N. W. 500.

In speaking of the provisions of the Texas statute whereby life insurance companies failing to pay a loss within a time specified in the policy after demand therefor are made liable to the payment of a certain per cent. damages on the amount of the loss, and all reasonable attorney's fees for the prosecution and collection of such loss, McCormick, J., in Merchants' Life Ass'n *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56, said: "The purpose of this statute is not to compel the payment of debts. * * * The obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance. To enforce the exercise of this righteous care on the part of the very strong in contracting with the weaker and less learned * * * would seem to be within the legislative power." See, also, Fidelity Mutual Life Ass'n *v.*

Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; Fidelity & Casualty Co. of New York *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364; Washington Life Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123; New York Life Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

In Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 43 L. Ed. 909, 19 Sup. Ct. 609, the court held the provision of the Kansas statute requiring a reasonable attorney's fee for the plaintiff to be allowed and made a part of the judgment on a recovery against a railroad company for damages from fire caused by the operating of its trains is in the nature of a police regulation designed to enforce care on the part of railroad companies to prevent the escape of fire from their moving trains, which subjects the property of adjacent owners to peculiar hazard, and has a reasonable relation to the object sought to be accomplished, although the statute imposes no specific duty by way of precaution; and the provision is not in violation of the fourteenth constitutional amendment, as an arbitrary classification of suitors, which deprives those affected of the equal protection of the laws. The Supreme Court of the United States, in speaking of the purpose of the statute, said: "Its monition to the railroads is not, 'Pay your debts without suit or you will, in addition, have to pay attorney's fees;' but rather, 'See to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed.'" See, also, St. Louis & S. F. Ry. Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; Grissell *v.* Housatonic R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138; Lumbermen's Mut. Ins. Co. *v.* Kansas City, Ft. S. & M. R. Co., 149 Mo. 165, 50 S. W. 281; Choctaw, O. & G. R. Co. *v.* Alexander, 7 Okl. 591, 54 Pac. 421.

In Porter *v.* Charleston & S. Ry. Co., 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670, the court held that 22 St. at Large, p. 443, of South Carolina, providing a penalty on common carriers for failure to pay or to refuse to pay damages on freight within 60 days, is not in violation of Const. U. S. Amend. 14, as denying equal protection of law. See, also, Frazier *v.* Charlestown & W. C. Ry., 73 S. C. 140, 52 S. E. 964.

And so, the Supreme Court of the United States, in upholding the constitutionality of a statute providing that every claim for loss or damage to property in possession of a common carrier shall be adjusted and paid within a specified time, and if not then paid the carrier should be liable to a penalty, shows that "the object of the statute was not to penalize the carrier for merely refusing to pay a claim within the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims; the penalty, in case of

recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carrier's unreasonable delay and refusal made necessary." Seaboard Air Line Ry. *v.* Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108. "Further," the court remarked in that case, "it must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions."

One of these duties which the carrier assumes is to carry safely and deliver goods intrusted to it for carriage. Whenever a railroad company receives live stock and understakes to transport the same for hire, such company assumes the relation of a common carrier and is held to a very strict accountability for the loss thereof; such accountability being independent of contract and imposed by law on grounds of public policy. Summerlin *v.* Seaboard Air Line Ry., 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191. By providing for the increase of damages where the loss or injury results from the want of care and the negligence of the carrier in transportation of freight, the statute causes the carrier to exercise more care in the handling of the freight by its servants and agents. The Legislature is presumed to have full knowledge of the conditions within the state and to intend no arbitrary selection or punishment, but to subserve merely the general interest of the public. Atchison, T. & S. F. R. Co. *v.* Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.

This statute designs, also, to bring about a reasonably prompt settlement of all proper claims, and a reasonably speedy trial thereon, for the statute is so framed that the penalty of 50 per cent. per annum interest which acts as a deterrent of the carrier in refusing to settle just claims, becoming included in the verdict, ceases to run thereafter, and the judgment therefor only bears 8 per cent. per annum. The statute tends to avoid expensive and annoying delays in litigation. "The corrosion of time acts on the causes of action, and wears out justice." These delays become annoying to lawyers, expensive and damaging to litigants, and, affecting as they must do large numbers of people in all parts of the state, become the source of much irritation and the cause of much friction between the carriers and the people, resulting sometimes in drastic legislation harmful to the carriers. Giving full force to the presumption that the Legislature had full knowledge of the conditions within this state, we may well conclude that this statute was really designed to accomplish a legitimate public purpose. Legislation of this nature will tend to lessen litigation, prevent a multiplicity of suits, save to the state and litigants expenses thereof, remove a source of friction

and unrest in the state, bring the shipper and the carrier to walk hand in hand, promote the public welfare and the good order of the people, increase the industries of the state, develop its resources, and add to its wealth and prosperity—results devoutly to be wished by all lovers of good government whether on or off the bench. "Regulations for these purposes," said the Supreme Court of the United States, in Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, "may press with more or less weight upon one than upon another; but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the public good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its applications, if within the sphere of its operations it affects alike all persons similarily situated, is not within the amendment." Seaboard Air Line Ry. *v.* Seegers, *supra;* Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; Thomes *v.* Hannibal & St. Joseph R. R. Co., 82 Mo. 538.

Verily, the subject-matter of this statute meets the test of constitutionality; the test being whether it has some relation to the public welfare, and whether such is, in fact, the end sought to be attained. Iler *v.* Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676.

We know that there are limits beyond which legislation and penalties may not go, even in cases where the classification is concededly legitimate and the subject-matter admittedly proper. It remains to be seen, then, whether the statute under review has gone beyond that limit in the nature and method of the regulations.

It requires no argument to show that the limit of time, 60 days, fixed by the statute for the investigation and settlement of these claims, is reasonable. There is no conflict either in the authorities on this point.

Now, as to the reasonableness or legality of the penalty imposed for a failure to pay the claim within 60 days: It will be observed that the penalty imposed is not 50 per cent. of the amount of the claim. The penalty is interest on the claim—interest at the rate of 50 per cent. per annum, or a fraction over 4 per cent. per month, not until the claim be paid, but interest only until a trial is had and judgment for the plaintiff is rendered, and thereafter the judgment only bears 8 per cent. per annum interest until paid. If the carrier will meet the plaintiff halfway in seeking a speedy trial of the cause, the payment of this penalty may be avoided within about three months on claims within the

jurisdiction of our inferior courts and about four to six months on claims in the circuit courts. Thus the penalty recoverable on a claim for $100, if collected by suit in three months, would be only $12.50 interest; or, if the $100 claim were collected in six months, the penalty recovered would be only $25. And yet the courts have upheld the constitutionality of statutes making life insurance companies failing to pay a loss within the time specified in the policy after demand made therefor liable to the payment of 12 per cent. damages on the amount of the loss and all reasonable attorney's fees. Merchants' Life Ass'n *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56. Under such a statute the penalty imposed would be $12 on a $100 policy, or within 50 cents of the amount recoverable under our statute in a reasonable time for the collection of the claim by suit.

In Harp *v.* Firemen's Fund Ins. Co., 130 Ga. 726, 61 S. E. 704, 14 Am. & Eng. Ann. Cas. 299, and comprehensive note thereto on page 301, the court held that a statute providing for the recovery of 25 per cent. damages and attorney's fees against insurance companies is not violative of the Constitution of the state or the United States. Under this statute, on a $100 claim, the plaintiff would be allowed $25, while under our statute he would recover the same amount only if the suit were tried and judgment rendered in six months after refusal to pay the claim.

This court, in Pensacola & A. R. Co. *v.* Braxton, 34 Fla. 471, 16 South. 317, has sustained the recovery under section 2 of chapter 3742, Acts 1887, of interest at the rate of 50 per cent. per annum in addition to the actual damages together with attorney's fees upon the failure of railroad companies to pay, within 30 days, for the cattle killed by them, where the companies fail to fence their tracks as required by the statute. See, also, Jacksonville, T. & K. W. Ry. Co. *v.* Prior, 34 Fla. 271, 15 South. 760.

In 1891, by chapter 4069, the Legislature authorized the recovery of double damages and attorney's fees from the railroad companies failing to pay claims, within 30 days, for cattle killed when there was a failure to fence their tracks.

In 1899, by section 5 of chapter 4706, again the Legislature increased the penalty for a failure to pay, within 30 days, the claim for cattle killed where the railroad track was not fenced, to double the value of the animal killed and for attorney's fees, instead of 50 per cent. per annum interest, and such remains the penalty to this day (section 2871, Gen. St. 1906); the time for payment of the claim being enlarged to 60 days.

If the question comes before us under this statute, will this court say that the penalty of double damages awarded thereby is exorbitant and excessive, because forsooth it at one time was only 50 per cent. per annum interest? Certainly not, for this court has already said, in Florida E. C. R. Co. *v.* Hazel, 43 Fla. 263, 31 South. 272, 99 Am. St. Rep. 114, while considering the

act of 1891, that there can be no doubt "it would be competent for the Legislature to provide the means for its enforcement, and in doing so to authorize the recovery of double damages and attorney's fees."

Under the statute and the decision of this court, if the railroad company fail to pay within 60 days a claim of $100 for stock killed by it, when the track is not fenced, the owner of the property may recover $100 in addition to the actual value of the property, besides attorney's fees.

Under the statute sued upon here, if the railroad company fail to pay within 60 days a claim of $100 for freight, it may be stock, lost or damaged (killed perhaps) by it, the owner of the property may recover, after six months' delay for a trial, the value of the property, plus 50 per cent. per annum, or $25, besides attorney's fees. Thus we have a recovery of a penalty of (10½) $100 under our statute as against $25 under this statute. It may be that a much larger recovery is proper under the fencing statute than under the freight statute; but, if $100 recovery be proper and reasonable under the one statute, we fail to see how we may say beyond a reasonable doubt that a recovery of $25 here is exorbitant and unreasonable so as to make the statute unconstitutional.

In Missouri, K. & T. Ry. Co. *v.* Board of Com'rs of Labette County, 9 Kan. App. 545, 59 Pac. 383, the court held the statute imposing a penalty of 50 per cent. per annum interest for a refusal to pay taxes and bringing injunction proceedings, instead of paying the taxes under protest, did not contravene the Constitution of Kansas, or the fourteenth amendment of the Constitution of the United States.

In Iowa, by statute common carriers are made liable for damages occasioned to baggage or other property of travelers through careless or negligent handling thereof and compensation of not less than $3 for every day's detention to travelers in consequence of such damage and necessary delay in suit for same. Anderson *v.* Toledo, W. & W. R. R. Co., 32 Iowa, 86.

In Kingsbury *v.* Missouri, K. & T. Ry. Co., 156 Mo. 379, 57 S. W. 547, the court held to be constitutional a statute authorizing a recovery of double damages against railroad companies sustained by reason of stock entering adjoining lands from the right of way in consequence of insufficient fences.

In Gorman *v.* Pacific R. R., 26 Mo. 441, text 450, 72 Am. Dec. 220, single damages only were recoverable; afterwards double damages were authorized by statute.

Sometimes statutes authorize four times the actual damages to be recoverable.

How may this court say that the penalty imposed by this statute is not reasonably necessary to accomplish the purposes of the statute, and that this statute is unconstitutional for that reason? What is to guide us?

The fixing of a rate of interest by the Legislature is a matter of judgment. The rate of interest where no public duty is involved is necessarily an arbitrary one. It is now 8 per cent. per annum. The Legislature could make it 10 or 12 per cent. to-morrow. May not the Legislature impose a penalty of 25 per cent. for the failure of the public duty here involved, and, if experience and the conditions demonstrate that it does not accomplish the purpose of the statute, may not the Legislature increase the rate of interest, or penalty within the bounds of reason, until the result arrived at the accomplished? Whether for this reason we do not know, but the fact is the rate of interest was fixed at 25 per cent. by the statute of 1905, while by the statute of 1907, and again by the statute of 1909 (Laws 1909, c. 5894), the rate is fixed at 50 per cent.

In Western Union Tel. Co. *v.* State of Indiana, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725, in speaking of the amount of the penalty of 50 per cent. (not 50 per cent. per annum) for nonpayment of taxes by a telegraph company, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, said: "The amount of the penalty was a matter for the Legislature to determine in its discretion, and the Supreme Court refers to the imposition of penalties in other instances under the statutes of Indiana, varying according to the particular subjects of taxation, apparently calculated to operate with quite as much harshness." Police regulations may not be declared void because deemed contrary to natural justice and equity, but only because they violate a constitutional right. State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491. Courts will certainly not interfere with the discretion of the Legislature in its exercise of the power to provide for the public welfare, as long as it keeps within the fair and reasonable scope of its powers. Brady *v.* Mattern, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291.

In Hayes *v.* Walker, 54 Fla. 163, 44 South. 747, this court said: "A liberal rule of construction should be applied when the constitutionality of a statute is questioned, and every reasonable doubt should be resolved in favor of the validity of the statute assailed. The court should, in deference to the legislative department of the government, uphold a statute alleged to be unconstitutional, unless it is clearly made to appear beyond a reasonable doubt that the statute is unconstitutional." In the same case, this court held: "Classifications for purposes of legislation may be made with reference to similarity of situation, circumstances, requirements, and convenience to best subserve the public interest. The test as to the validity of classification for purposes of legislation is good faith, not wisdom." In Seaboard Air Line Ry. *v.* Simon, 56 Fla. 545, text 551, 47 South. 1001, 20 L. R. A. (N. S.) 126, citing Billings *v.* Illinois, 188 U.

S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400, this court said: "Great latitude should be accorded to the Legislature in the exercise of its proper powers."

In Judy *v.* Thompson, 156 Ind. 533, 60 N. E. 270, the court said: "The penalty in such cases is imposed upon grounds of public policy. The motives of the Legislature are not open to judicial inquiry."

In Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. 110, 24 L. Ed. 463, quoted with approval in St. Louis & S. F. Ry. Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, Mr. Justice Field, speaking for the court, said: "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

In Trice *v.* Hannibal & St. Joseph R. R. Co., 49 Mo. 438, the court said: "Even if we considered such liabilities to be inexpedient or illogical, we could not say that the Legislature had transcended its power."

In Illinois Cent. R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. 618, the court said: "The measure of the damages or failure to fence as well as the disposition of recovery in excess of actual compensation, was wholly within the legislative discretion."

In considering the reasonableness of this legislation, it must be observed that the 50 per cent. interest provided for by this statute is not to be collected in all cases, even though the carrier refuses to pay the claim within 60 days. The claimant may not recover the interest at all "unless he recovers judgment for a sum which fixes the principal sum of said claim at an amount greater than the amount which said common carrier had offered and tended to the claimant in settlement of his claim before the expiration of said sixty days in which the said common carrier is required to pay such claims under the provisions of section one (1) of this act." This provision is apparently designed to prevent (a guaranty against) the making of excessive claims. The statute may not be said to be unconstitutional because it puts the burden upon the carrier to prove an amount equal to its tender or offer, instead of making the recovery of the interest conditioned upon the proof by the plaintiff of the full amount of his claim. This would be a mere matter of detail or expediency or wisdom—not a matter of power. As said by the Supreme Court of the United States in Seaboard Air Line Ry. *v.* Seegers, supra: "The matter is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows

what it received and what it delivered. It knows what injury was done during the shipment, and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than any one else."

In Pensacola & A. R. Co. *v.* Braxton, 34 Fla. 471, 16 South. 317, this court, considering the statute allowing recovery of 50 per cent. per annum damages for cattle killed by railroad companies, and for attorney's fees, said: "Our construction of the two sections, when taken together, is that it is not necessary that the plaintiff shall recover the exact or full amount of damages as claimed in the written notice that he is required to give to the defendant as a prerequisite to his suit, in order to entitle him to the recovery of interest at the special statutory rate, and to attorney's fees."

The statute does not fix an arbitrary sum for attorney's fees; but the court may allow only a reasonable attorney's fee, not exceeding a maximum allowance on the amount recovered, if the claimant is entitled thereto.

In view of the safeguards thrown around the collection of the penalty, in view of the differences in human judgment, remembering that this question is one primarily for the judgment of legislators, who live in and represent all parts of the state, and who must necessarily know the conditions therein upon this matter and what penalty is necessary to cause a compliance with the provisions of section 1 of the statute, we are not prepared to say, beyond a reasonable doubt, that the penalty is so exorbitant and unreasonable as to render the statute unconstitutional; on the contrary, the regulations herein appear to be reasonably necessary and conducive to the public welfare.

The trial was had upon the plea of not guilty, and the contention that the testimony does not show that S. S. Coachman, consignee, was the agent of the plaintiff as alleged to be in the declaration, cannot be considered under this plea. This allegation is merely one of the facts stated in the inducement, and such fact was not put in issue by the plea of not guilty. Gainesville & Gulf R. Co. *v.* Peck, 55 Fla. 402, 46 South. 1019, and the cases cited; also, Atlantic Coast Line Ry. Co. *v.* Partridge, 58 Fla. —, 50 South. 634.

The defendant complains that the referee refused to allow it to file additional pleas during the trial of the case. The action of the referee, if error, was without injury, as the defendant was permitted to introduce evidence to support the matters set up in the additional pleas. These pleas appear to have been regarded by the trial court, and for the purposes of this case

have been considered here, as equivalent to the general issue. Gainesville & Gulf R. Co. *v.* Peck, 55 Fla. 402, 46 South. 1019.

For the same reason, we cannot consider the contention that the plaintiff failed to give notice in writing to some officer or agent of the company before moving the stock.

As to the contention that the shipper agreed to load and unload the stock at his own risk, and that the injury was due to improper loading, it may be said that the evidence on this point is conflicting; but there is evidence that the stock was loaded properly, and this contention is not sustained.

Whether one of the animals was thrown down in the car and injured by the negligent manner of moving the car is a question for the referee acting as the jury, and on the evidence before us we do not see any reason for reversing his finding thereon. 2 Hutchinson on Carriers, par. 639; Illinois Cent. R. Co. *v.* Light, 39 Ill. App. 530.

It is contended that the plaintiff is limited in the amount of his recovery, if entitled to recover at all, to the maximum sum of $75 each as the stipulated value of his horses and mules; and that the finding of the referee is in excess of that amount.

A common carrier of goods cannot legally stipulate for exemption from liability for losses occasioned by its own negligence, and all stipulations for exemption, whether gross or ordinary, are ineffectual. Summerlin *v.* Seaboard Air Line Ry., 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191. The shipper, however, by his representations or agreements as to the value of the goods, may estop himself from recovering their full value, notwithstanding they are lost through the carrier's negligence. This would be the case when the shipper has placed upon his goods a specific value, the carrier accepting the same in good faith, as their real value, the rate of freight being fixed in accordance therewith. Such a contract, fairly entered into whereby the shipper and the carrier agree on a valuation of the property carried with a rate of freight based on condition that the carrier assumes liability only to the extent of the agreed valuation simply fixes the rate of freight and liquidates the damages, and will be upheld as a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight he receives and also of protecting himself against extravagant and fanciful valuations. Atlantic Coast Line R. Co. *v.* Dexter & Connor, 50 Fla. 180, 39 South. 634, 111 Am. St. Rep. 116; Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Harvey *v.* Terre Haute & Indianapolis R. Co., 74 Mo. 538.

In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast upon it by the common law, except as modified by statute; and, if lost under circum-

stances rendering the carrier liable by the general rule of law, it must respond, unless it can show that there was a contract, or a special acceptance equivalent to a contract, which exempts it from the ordinary liability of common carriers. Moore on Carriers, p. 298. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts. Baltimore & O. R. Co. *v.* Hubbard, 72 Ohio St. 302, text 316, 74 N. E. 214.

If the agreement is in writing, it must be expressed in such manner and form as to be understood by a person of average intelligence, or, if not so expressed, it must be shown to have been explained to the shipper, unless he has such knowledge as will enable him to understand the meaning of the writing. Carpenter *v.* Baltimore & O. R. Co., 6 Pennewill (Del.) 15, 64 Atl. 252. See the valuable and extensive note on these questions appended to the case of Donlon Bros. *v.* Southern Pacific Company, 12 Am. & Eng. Ann. Cas. 1118, and comprehensive note on page 1124.

Contracts limiting the common-law liability of carriers are not favored by the courts. Exemption from liability will not be presumed, but must be found clearly expressed in the contract. Clauses inserted in a contract granting immunity to the carrier from its common-law obligations will be strictly construed against the carrier. Such clauses must be clear and distinct expressions free from ambiguity, leaving nothing to implication or inference. Moore on Carriers, pp. 330, 351; Jennings *v.* Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394; Edsall *v.* Camden & Amboy Railroad & Transportation Co., 50 N. Y. 661.

As to the shipment of stock from Lakeland to Live Oak, the following clause in the bill of lading or special contract is relied upon as limiting the liability of the defendant company:

"And it is further agreed, that should damage occur for which the said company may be liable, the value at the place and date of shipment shall govern the settlement in which the amount claimed shall not exceed for a stallion or jack, $———; for a horse or mule, $———; cattle, $——— each; for hogs, $———; and for sheep, $———." There was no evidence that the blank places above were not filled out through mistake, and there is an entire failure to show that the shipper and the carrier in fact agreed upon any valuation of the horses or mules whatsoever. Neither was there any evidence of the value of the stock at the place and date of shipment. And the plaintiff testified without contradiction that he did not agree upon a limited valuation of his stock for shipment.

Clearly the language of the bill of lading quoted above does not in itself bind the plaintiff, in the amount of his recovery, to the maximum sum of $75 each as the stipulated value of his horses and mules.

The shipment of stock from Live Oak to Clearwater was not made under any written contract or bill of lading.

The attempt is made however, to set up a special contract as to both shipments by showing that the plaintiff paid for the transportation of his stock at a tariff of charges under which by the published schedule of rates of the defendant and the published rules and regulations of the Railroad Commission of this state, the defendant's liability is limited to the maximum sum of $75 for each horse or mule injured. This alone is not sufficient for it is not shown that these tariff rates were brought home to the plaintiff, or that he knew that the payment of the special tariff charge by him would bind him to a special maximum valuation of his stock. It was necessary to show that the plaintiff had notice or actual knowledge of these terms at the time or before the delivery of the stock by him to the defendant company to be transported, and that they were assented to by him. Baltimore & O. R. R. Co. *v.* Brady, 32 Md. 333; 3 Am. & Eng. Ency. Law 10; 19 Central Law Journal, 163.

If, by a rule of the carrier, of which the shipper has notice its liability is fixed by the rate of freight paid, and for the purpose of obtaining a certain rate of freight the shipper reports to the carrier a valuation on the goods shipped, the liability of the carrier is fixed by such agreement. If, however, the shipper has no notice of the rule of the carrier, the rule is otherwise. Klair *v.* Wilmington Steamboat Co., 4 Pennewill (Del.) 51, 54 Atl. 694.

As the evidence is not so clear as to forbid any other inference than that the shipper consented to a specified valuation, the question of consent must be left to the referee's determination. Taylor *v.* Weir (C. C.) 162 Fed. 585; Carpenter *v.* Baltimore R. R. Co., 6 Pennewill (Del.) 15, 64 Atl. 254.

The rules and regulations of the Railroad Commission of this state prescribe the maximum valuation, in the shipments of horses and mules, of $75 each for a certain released rate, and, for every increase of 100 per cent. or fraction thereof in valuation, there shall be an increase of 50 per cent. in rate; but the shipper has the option to ship at his own or the carrier's risk, and he will not be bound, in the limit of his recovery, by the payment of a released rate, unless it be shown that he knew the rate paid was a released rate and there was a fair meeting of the minds of the shipper and the carrier that by payment of the released rate the recovery of the shipper would be limited to a certain maximum sum clearly agreed upon. See the comprehensive note to Donlon Bros. *v.* Southern Pac. Co., 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, 12 Am. & Eng. Ann. Cas. 1118, text 1124.

Mr Lane, in his report for the interstate Commerce Commis-

sion (volume 13, p. 562), has well said: "The carrier occupies a position of strategic advantage with respect to matters of transportation. The tariff rules and regulations are of its own making; the bills of lading and shipping receipts are drafted by its own attorneys. The shipper, on the other hand, has no such vantage ground. It cannot be expected that he will always be familiar with the terms of the carrier's rate schedules and bills of lading, or that he will invariably know his legal rights. Practically he often has no choice but to accept the terms that are offered him. * * * Much of the friction that has developed between the public and the railroads in this regard is due doubtless to the fact that shippers, at the time of tendering their property for carriage, are not clearly advised of their rights, and do not understand fully the nature of the receipt which they sign. In the ordinary course of business few shippers are well informed as to the carrier's regulations. Many shippers are in ignorance of the different rates, are given bills of lading providing for limited liability, and become aware of the limitation clause only when a claim for damages is presented. It is, therefore, peculiarly the duty of the carrier's agents to give every reasonable assistance to shippers, in order that they may know what are the lawful and most advantageous terms upon which the carrier's services may be secured. The provisions of tariffs and bills of lading should be fair and unambiguous, and free from suspicion of illegality. The shipper should be allowed his choice of rates which leave the carrier's liability unlimited as at common law, or lower rates based upon such a limited liability as the law sanctions. The rate finally fixed would not then be open to attack upon the ground that it was imposed upon the shipper, and that he did not knowingly accept its terms."

The referee first allowed the sum of $200, as attorney's fee, and then ordered a remittitur of $98.75, leaving an award of $101.25, or 15 per cent. on the principal sum of the claim plus the 50 per cent. per annum interest. In this, the referee erred. The maximum sum allowed by the statute is 15 per cent. on any amount recovered greater than the sum of $100. We think the amount recovered means the amount of the claim recovered, and not that amount plus the 50 per cent. interest. The amount of claim recovered is made the basis of the 50 per cent. interest and the attorney's fee allowed by the statute. This is the plain meaning and intention of the statute. It provides that: "when the said claimant shall bring suit and recover * * * for his claim, * * * he shall be allowed the said fifty per cent. per annum." The amount of recovery relates to the disputed amount of the claim; the 50 per cent. not being recovered in this sense, but allowed and fixed by the statute. Especially is this clear in that part of the statute providing that the at-

torney's fee "shall be fixed by the court, not to exceed fifteen dollars, if the amount recovered does not exceed one hundred dollars."

The referee should have awarded as attorney's fees not more than 15 per cent. on $450, or $67.50. The amount awarded was $101.25. If the defendant in error, therefore within 30 days enters a remittitur for the sum of $33.75, being the excessive award of attorney's fees, the judgment will be affirmed; otherwise the judgment stands reversed.

The costs on this writ of error will be taxed against the defendant in error.

WHITFIELD, C. J., and COCKRELL and HOCKER, JJ., concur.

SHACKELFORD, J., dissents.

TAYLOR, J., absent on account of illness.

LESLIE *v.* ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas, March 12, 1910.)

[107 Pac. Rep. 765.]

Carriers—Contract for Stock Attendant—Reasonableness.—A cattle shipper was given free transportation to accompany his stock, subject to the following restrictions contained in a signed contract:

"We further agree to specially observe the following regulations:

"First. Remain in a safe place in the caboose attached to the cars while the train is in motion.

"Second. Get on and off said caboose only while the same is still or stationary.

"Third. Will not get on or be on any freight car while switching is being or is to be done at stations or other places or at any other time."

Held, the regulations were reasonable, and not in contravention of law or sound public policy.

Carriers—Carriage of Stock—Duty of Attendant under Contract.—A cattle shipper using such transportation must regulate his conduct at stopping places by his contract, and hence is obliged to ascertain and know whether he has time to examine his stock and return to his place in the caboose before the train proceeds on its journey.

Carriers—Contract for Stock Attendant—Waiver of Provisions by Carrier.—A cattle shipper, using transportation of the character described, completed an examination of his stock at a station just as the train commenced to move. The caboose was some 20 cars to the rear. He started to walk toward the caboose when the con-

ductor told him he had better get on; that the train would be going so fast by the time the caboose got there he could not get on. He then climbed the ladder of a freight car, and before he reached the top was raked off by a water crane overhanging the track. Held, the conditions of the contract were waived, that he was not a mere licensee, and that the carrier is liable in damages for the injuries he sustained.

Carriers—Injuries to Person Accompanying Freight—Question for Jury—Contributory Negligence.—Under the circumstances of this case, it is held, the question whether the shipper referred to was guilty of contributory negligence was one for the jury to decide.

Burch, Porter, and Graves, JJ., dissenting in part.

(Syllabus by the Court.)

Appeal from District Court, Reno County; P. J. Galle, Judge.

Action by George M. Leslie against the Atchison, Topeka & Sante Fè Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, and *A. A. Scott,* for appellant.
F. L. Martin and *Warren H. White,* for appellee.

BURCH, J. The plaintiff recovered damages for personal injuries occasioned by the defendant's negligence, and the defendant appeals. The plaintiff shipped a car load of cattle over the defendant's road from Abbeyville, Kan., to Kansas City, Mo. He accompained the cattle, riding on a pass subject to the following among other restrictions contained in a signed contract: "We further agree to specially observe the following regulations: First. Remain in a safe place in the caboose attached to the cars while the train is in motion. Second. Get on and off said caboose only while the same is still or stationary. Third. Will not get on or be on any freight car while switching is being or is to be done at stations or other places or at any other time." When the train reached Strong City the plaintiff alighted to inspect his cattle. Before he could reach the car containing the cattle it had been taken to a distant part of the yards to accomplish some necessary switching. He waited until the car was returned, examined the cattle, and just after he finished the examination observed the train was in motion. He started toward the caboose, which was some 20 cars away, when either the conductor or brakeman told him he had better get on; that the train would be going so fast by the time the caboose got there he could not get on. His recollection was that it was the conductor who spoke. At this time the train was moving eastward on the main track, and the plaintiff was standing between that track and a passing track south of it. While waiting for the return of his car of cattle he had been conversing with a

friend who was leaving the train at Strong City, and looking eastward he noticed a water crane standing between the two tracks several car lengths away. The crane was adjusted to serve engines on either track and he remembers that, at the time, it was standing "angling to the northwest a little, and about halfway between a horizontal." Immediately after receiving the conductor's admonition the plaintiff mounted the ladder of a freight car, and when he had ascended far enough that his head and shoulders were above the eaves of the car he stopped and turned partly around to the southwest to say good-bye to his friend. At this moment the crane struck him and he was knocked to the ground and severely injured. While the plaintiff was hanging on the side of the car the engineer of an engine on the passing track, moving up to the crane to take water, saw the plaintiff was giving no heed to the crane and shouted a warning to him.

The jury returned special findings of fact, among which are the following: "Did plaintiff climb up on the ladder at the side of the car after the train on the main line started east? Ans. Yes. At the time he climbed up on the ladder was there anything to hinder him from seeing the crane between the tracks? Ans. No. Before plaintiff attempted to get on the train, was there anything to hinder him from seeing the crane between the tracks? Ans. No. How far from the crane was plaintiff at the time he attempted to get on the train? Ans. Six or eight car lengths. Where was the plaintiff standing prior to his attempting to get on the train? Ans. Between the tracks. Who, if any one, was he talking to at that time? Ans. No one. Did the plaintiff before attempting to get onto the train see the water crane? Ans. Yes. State whether or not plaintiff looked in a southwest direction after he got up on the ladder of the car. Ans. Yes. Which way was plaintiff's face turned at the time the train approached the crane? Ans. Southwest. Was he looking for comrades south and west of him at the time he was struck? Ans. Yes. Was he shouting good-by to his friends at the time the water crane struck him? Ans. Yes. How far from the top of the car was plaintiff at the time he was struck? Ans. Head and shoulders above the eaves of the car. At the time he was struck, was he climbing up the side of the car or had he stopped for some purpose? Ans. Had stopped. Was J. H. Shock engineer of the locomotive on the passing track? Ans. Yes. Did he see plaintiff when he was hanging on at the side of the car? Ans. Yes. Did he see that plaintiff was not looking at the crane between the tracks? Ans. Yes. Did he shout to plaintiff to look out for the crane? Ans. Yes. For what distance did plaintiff hang onto the side of the moving car? Ans. Six or eight car lengths. Was the main line track east-bound perfectly straight at the locality where plaintiff was injured? Ans.

Yes. Was the passing track straight? Ans. Yes. How many car lengths west of plaintiff was the caboose at the time he attempted to get on? Ans. About 20 cars. Was the caboose at the west end of the east-bound train? Ans. Yes. Did the plaintiff make any attempt to get on the caboose of said train? Ans. Yes. How long was plaintiff talking with his friends before the train pulled out on the main east-bound track? Ans. About 10 minutes. Was there anything to prevent plaintiff from walking down to the caboose before it started? Ans. Yes. If there was any obstrutcion mention what it was? Ans. Waiting to look after his stock. Did plaintiff ask anybody to stop the train when it was passing? Ans. No. Did the engine which was drawing the train on which plaintiff's cattle were being transported take water at Strong City? Ans. Yes. How long did it take defendant to set out the cars and take water, and get ready to start on with the train, on the main line? Ans. About 20 minutes. If plaintiff had been looking toward the crane between the tracks, would he have seen it before he got to it? Ans. Yes. If he had held his body close to the side of the car would the crane have struck him? Ans. Yes. If he had jumped off of the side of the car would the crane have struck him? Ans. No. How fast was the defendant's train going at the time the plaintiff got onto the side of the car? Ans. Just started."

The defendant claims it owed no duty to the plaintiff except to avoid wanton injury to him, that he assumed the risk, and that he was himself guilty of negligence contributing to his injury. Error is assigned on the giving and refusing of instructions, but in view of the plaintiff's admissions and the findings of fact the matter of instructions is no longer of consequence. The controlling facts are now beyond dispute, and this court can apply the law to them.

The contract was intended to promote the plaintiff's safety, was reasonable in its terms, and did not contravene either the law or sound public policy. Having undertaken to accompany the cattle under the conditions expressed in the contract, the plaintiff was bound to observe them. Ft. S., W. & W. Ry. Co. *v.* Sparks, 55 Kan. 288, 39 Pac. 1032. When the plaintiff undertook to make an inspection of his cattle at Strong City he was bound to order his conduct so that he could comply with the conditions of his pass. He was obliged to ascertain and know whether he had time to examine his cattle and return to his place in the caboose before the train started on its journey. If this were not true, the carrier's control, over the movements of a stock train would be surrendered to the shippers accompanying it. The plaintiff therefore was at fault when he found himself standing on the ground twenty car lengths from the caboose and the train in motion. At this point, however, the conductor intervened, and the difficult legal question is, What was

the effect of the conductor's statement on the rights of the parties? The case is different from that of Railroad Co. *v.* Green, 60 Kan. 289, 56 Pac. 477, in which the trainmen had information that the passenger was riding in a freight car and not in the caboose. There the passenger deliberately took the chances with knowledge of the peril and the trainmen simply did not interfere. The case is also different from that of A., T. & S. F. Ry. Co. *v.* Lindley, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515. There, a shipper took a position of danger on top of a car in obedience to a direction of the conductor. The purpose was to assist in giving signals and not to look after stock, and the court held the risk was voluntarily assumed. Here, the plaintiff was not called on by the conductor to engage in a foreign enterprise. What the conductor said related to a subject specifically covered by the contract for transportation.

A majority of the court is of the opinion that the conductor, who was in charge of the train and its passengers and was acting for the company, waived the conditions of the pass by telling the plaintiff he had better get on the moving train without waiting for the caboose to come up, that the plaintiff had the rights of a passenger while complying with the conductor's invitation, direction, admonition, or whatever it may be called, and consequently that the defendant was bound to afford the plaintiff an opportunity to reach the caboose without the hazard of being raked off the train by overhanging structures. He was assuming the risk of being left behind by walking toward the approaching caboose. He would not have been on the side of the car except for the conductor. Since the conductor was responsible for his being in an exposed position, the defendant was bound to protect him.

The plaintiff's means of observation while he was ascending the ladder on the side of the moving cars were limited. His notice of the crane had been incidental. He was obliged to give close attention to the act of climbing. He came in range of the protruding portion of the crane only by the composite movement of climbing and going forward. Granting he was bound to observe his surroundings and to see the crane as he approached it, it was difficult for him to determine whether it actually portended danger until he reached it. Being a passenger he was not bound to anticipate danger. Whether, on the whole, his conduct was that of a reasonably prudent man was a question for the jury to determine, and the verdict that he was not guilty of contributory negligence is conclusive.

Mr. Justice Porter, Mr. Justice Graves, and the writer are of the opinion the contract governed the plaintiff all the time. He was responsible for his predicament, and had deprived himself of the right to board the train. The caboose was in motion, and

he was not at a safe place inside of it. The plaintiff was expecting to catch the moving caboose in violation of his contract. He was walking toward the rear of the train for that purpose. The chances were he would get left and get hurt at the same time. The conductor saw the situation, and told him he had better get on where he was because the caboose would be moving too rapidly when it came up. This act of the conductor did not abrogate the written contract and substitute another, changing all the duties and liabilities of the parties. While mounting the ladder of the moving freight car the plaintiff was a mere licensee, voluntarily in a place of danger, just as he would have been had he responded to an invitation of the conductor to come up out of the caboose and ride on top of the train. The defendant owed him no duty except not to injure him wantonly. In any event, when the plaintiff took an unusual way of reaching his proper place on the train he was bound to make diligent use of all his faculties to avoid danger. His pass charged him with notice that it was unsafe to ride anywhere except in the caboose, and he had seen the crane and marked its position. There is no evidence of difficulty experienced in apprehending danger from the crane. The plaintiff did not look at all. He heedlessly chose the rate of speed for his ascent of the ladder, and when he reached the only place where he could be hurt he stopped, turned his back toward the crane, and abandoned himself to civilities toward the friend he was leaving. Therefore he was guilty of contributory negligence. However, for the reason stated, the judgment of the district court is affirmed.

All the Justices concurring.

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Intending passenger while in waiting room. Metcalf *v.* Yazoo & M. V. R. Co. (Miss.), 743.

Mail agents. Southern Ry. Co. *v.* Harrington (Ala.), 148.

Person intending to take passage on train at depot 15 minutes before its arrival to deposit his satchel in waiting room. Metcalf *v.* Yazoo & M. V. R. Co. (Miss.), 743.

Plaintiff was at all times a passenger, since there is a continuing duty on the carrier to provide a passenger safe passage from train to depot, and from depot to sleeping car. Denver, etc., R. Co. *v.* Derry (Colo.), 141.

CARRIERS OF PASSENGERS—Continued.

Postal clerks. Southern Ry. Co. *v.* Harrington (Ala.), 148.

Presumption that person who boards train intends to pay his fare. Broyles *v.* Central of Georgia Ry. Co. (Ala.), 155.

Presumption that ticket issued by the railroad to another, and by him given to the injured passenger, was issued for a valid consideration, and therefore conferred upon the passenger all the right of one. Denver, etc., R. Co. *v.* Derry (Colo.), 141.

Where a passenger, in taking a train, instead of using the station platform, chooses a course with which he is not familiar, and which he knows was not intended for his use, he becomes a trespasser, or at most a mere licensee. Boden *v.* Boston Elev. Ry. Co. (Mass.), 740.

CHILDREN.

See LICENSEES.

Attracting Children.

There was no implied invitation or licensee by defendant to children to enter through gate in its right of way fence, and it owed a child injured by electricity no duty to cover the rail carrying the power; nor did the fact show willful injury. Riedel *v.* West Jersey & S. R. Co. (C. C. A.), 312.

COMMON CARRIERS.

See CONSTITUTIONAL LAW.

Act of God.

Burden is on carrier to show that it was prevented from safe delivery of freight by the act of God, and not from delay or negligence in transportation, where there was an intervening human agency which contributed to a loss of freight. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Burden of Proof.

In action for loss by fire of goods in transportation, loss to be at shipper's risk, the burden is on the shipper to show that the fire was caused by the negligence of the carrier. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Cars.

Duty to furnish cars at shipper's warehouse according to custom, sufficiency of tender of goods for shipment to create. Richey & Gilbert Co. *v.* Northern Pac. Ry. Co. (Minn.), 121.

Duty to furnish where usual course of business has been for carrier to furnish cars at a warehouse maintained by shipper. Richey & Gilbert Co. *v.* Northern Pac. Ry. Co. (Minn.), 121.

Remedy of shipper where failure to furnish. Richey & Gilbert Co. *v.* Northern Pac. Ry. Co. (Minn.), 121.

Consignee for value, or as one who had incurred liability as consignee, authorizing him to sue for any shortage, certain person was properly considered as. Thomas *v.* Atlantic C. L. R. Co. (S. Car.), 128.

Custom and Usage.

Obligation of carrier to conform to usage. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Damages.

Coal company could not recover for profits that would have accrued under a subsequent contract made by it to deliver coal on a certain day to a buyer, if the railroad had no knowledge, when it agreed to deliver the cars it failed to furnish, that the

COMMON CARRIERS—Continued.

coal company contemplated such a contract. Clyde Coal Co. *v.* Pittsburg, etc., R. Co. (Pa.), 750.

Failure to furnish cars, measure of damages where. Richey & Gilbert Co. *v.* Northern Pac. Ry. Co. (Minn.), 121.

Degree of Care.

Carrier is not, generally, an insurer against damages to freight from changes in temperature. White *v.* Minneapolis, etc., Ry. Co. (Minn.), 747.

If after acceptance of freight its transportation is delayed, the carrier must use reasonable care to protect it from changes of temperature. White *v.* Minneapolis, etc., Ry. Co. (Minn.), 747.

Rules making carrier an insurer not applicable, when. Kansas City, etc., Ry. Co. *v.* Cox (Okl.), 104.

Delay.

Burden is on carrier to show that injury to the freight due to heat or freezing was not due to its negligence or delay, where the delay was wholly unaccounted for. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Delivery by Carrier.

Burden of proof to show true ownership of goods, and that person to whom they were delivered had authority to receive them, where carrier delivers goods to person not named in bill of lading as consignee it has the. Florence, etc., R. Co. *v.* Jensen (Colo.), 771.

Notice to carrier that car placed in position by it for loading is ready for shipment, necessity of shipper giving. Kansas City etc., Ry. Co. *v.* Cox (Okl.), 104.

Relatively to property for carriage, railroad companies owe no duty of diligence under the law, except where the property has been delivered at stations or places designated by the company for its delivery. Ashley *v.* Central of Georgia Ry. Co. (Ga. App.), 419.

To whom delivery may be made. Florence, etc., R. Co. *v.* Jensen (Colo.), 771.

Under a contract providing that a carrier would deliver the outfit of a railroad contractor to point of shipment from any point on the carrier's line, the word "point" would be construed to mean a station or point where the carrier was doing its regular business as a common carrier. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Discrimination.

Granting milling privilege in transit. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Duty to Transport.

It being the duty of a carrier of interstate commerce to file and publish its schedule rates, its failure to do so is no defense to an action for the penalty for refusing to receive for transportation an interstate shipment. Burlington Lumber Co. *v.* Southern Ry. Co. (N. Car.), 413.

The carrier was liable under N. Car. Revisal 1905, § 2631, imposing a penalty on carriers for refusal to receive freight for shipment. Burlington Lumber Co. *v.* Southern Ry. Co. (N. Car.), 413.

Limiting Liability.

Burden on carrier to show there was a contract exempting it from ordinary liability of common carriers. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.

COMMON CARRIERS—Continued.

Exemption of carrier from liability will not be presumed. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.

Interstate commerce act, how far right to limit liability is not affected by the. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Requisites of valid contract limitation, under Burn's Ann. St. 1908, § 3919. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Right of common carrier to limit its liability by agreement. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Under certain contract, railroad could not be held liable, except for gross negligence or willful misconduct for loss by fire of freight delivered to it on its right of way. Ashley *v.* Central of Georgia Ry. Co. (Ga. App.), 419.

Negligence.

In action for destruction of goods by fire, whether the carrier was negligent in leaving the shipment at an out of the way station, where there was neither station agent, nor water, and no one to look after the safety of the cars containing it, was quesfion for jury. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Parties.

Shipper is entitled to sue for the penalty prescribed by N. Car. Revisal 1905, § 2631, for refusal of carrier to accept a shipment of freight. Burlington Lumber Co. *v.* Southern Ry. Co. (N. Car.), 413.

Rates.

Rates for allowing milling of lumber in transit, validity of rule of Railroad Commissioners fixing. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Regulation.

Right of public to control carrier. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Stopping lumber in transit for treatment, compensation of carrier for. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Stopping lumber in transit for treatment, nature of right of. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Who Are.

Carrier was a common carrier as to a contractor's outfit, etc., and not a private carrier. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Common carrier may become a "private carrier," when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Defendant, although operating a meagerly equipped railway, assumed the duties of a common carrier of freight and passengers. White *v.* Minneapolis, etc., Ry. Co. (Minn.), 747.

Tests to be used in determining whether a carrier is a common carrier. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

Under a certain contract, carrier could not escape liability for loss of contractor's outfit on the theory that it was a private carrier, in that the outfit had been picked up at a place which was beyond any station of the carrier, where, after the goods arrived at a station, they were billed through to point of destination, as any other goods, though at the contract rate. Santa Fe, etc., Ry. Co. *v.* Grant Bros. Const. Co. (Ariz.), 420.

CONCURRING NEGLIGENCE.
See NEGLIGENCE.

CONNECTING CARRIERS.
See INTERSTATE COMMERCE.
Initial carrier's liability to deliver continues throughout whole transit, and connecting carriers are its agents in carrying out contract, when. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.
Interstate commerce act fixing the respective responsibility of connecting carriers, constitutionality of. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Limiting Liability.
Bill of lading of initial carrier limiting its liability to loss occurring while the property is in its possession is simply declaratory of the common law. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.
Recovery of statutory penalty for failure to adjust or pay for loss or damage as affected by limiting liability to own line. McMeekin *v.* Southern Ry. Co. (S. Car.), 129.
Stipulation that no carrier shall be liable for loss or damage not occurring on its own portion of the route, validity of. McMeekin *v.* Southern Ry. Co. (S. Car.), 129.

Presumptions.
Presumption that connecting carrier has received entire shipment. McMeekin *v.* Southern Ry. Co. (S. Car.), 129.

CONSTITUTIONAL LAW.
See EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; SPURS AND SIDE TRACKS.
Constitutionality of certain penal statute of Florida enacted for the regulation of railroads and other common carriers. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.
Mo. Rev. St. 1899, § 2864, prescribing a limited pecuniary penalty recoverable for the death of a person resulting from the negligence of any person engaged in running a locomotive, etc., is not a delegation to the jury of the legislative power of fixing penalties. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.
Penalty of 50 per cent per annum interest on principal sum of claim for freight or express lost or damaged by common carrier, for failure to pay claim within certain time, validity of certain statute allowing. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.
Provisions of ch. 5618, Fla. Acts 1907, are not confined to railroads alone, but include all common carriers, thus making a classification in accordance with the requirements of the constitution as to due process of law. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.

CONTRIBUTORY NEGLIGENCE.
See ACCIDENTS ON TRACK; BAGGAGE; CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS; TICKETS AND FARES.
Attempt of comrade or bystander to save one suddenly subjected to peril through another's negligence. Norris *v.* Atlantic Coast L. R. Co. (N. Car.), 321.

Burden of Proof.
Contributory negligence must be alleged and proved in certain way. Farris *v.* Southern Ry. Co. (N. Car.), 523.

CONTRIBUTORY NEGLIGENCE—Continued.

Pleading.

Answer pleading contributory negligence in general terms is good after verdict. Gardner *v.* Metropolitan St. Ry. Co. (Mo.), 448.

Question for jury, when. Denver City Tramway Co. *v.* Wright, (Colo.), 360.

CORPORATIONS.

See RAILROADS.

CROSSINGS.

See ACCIDENTS ON TRACK; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; STREET RAILWAYS; TRESPASSERS.

Contributory Negligence.

Attempting to drive across street car tracks with knowledge that car is approaching. Fallon *v.* Boston Elev. Ry. Co. (Mass.), 372.

Of crossing watchman of one company in failing to do his duty in watching for trains, when struck by engine of another company lawfully using the track of his employer, prevented recovery against the other company, although its engine was running in violation of speed ordinance. Thompson *v.* Southern Ry. Co. (Ga.), 348.

Question for jury where traveler's view of tracks was obstructed. Talley *v.* Chester Traction Co. (Pa.), 339.

Train could have been readily seen by deceased before he went upon track, railroad was not liable where. Hamilton *v.* Central R. Co. (Pa.), 265.

Farm Crossings.

Arrangement in question with landowner was not a compliance with railroad charter to furnish proper farm crossings. Louisville & N. R. Co. *v.* Troutman (Ky.), 242.

Railroad's charter duty to furnish farm crossings was a continuing one, which was enforceable by the landlord whenever the necessity therefor arose. Louisville & N. R. Co. *v.* Troutman (Ky.), 242.

Injuries sustained by being struck by suddenly backed train obstructing crossing, while passing around the end of it, declaration was not ill because of failure to aver that defendant's agents actually saw plaintiff in time to prevent the accident, in action for. Johnson *v.* Atlantic Coast Line R. Co. (Fla.), 263.

Intersections.

Certain proposed grade crossing was reasonably "necessary," and would not "unnecessarily impede travel," or "transportation" on plaintiff's road, within Iowa Code, § 2020, permitting a railroad to cross another railroad under such conditions. Dubuque, etc., R. Co. *v.* Ft. Dodge, etc., R. Co. (Iowa), 292.

Last Clear Chance.

Doctrine of last clear chance was not applicable. Clark *v.* St. Louis, etc., R. Co. (Okl.), 247.

Right of street and interurban railroad to cross at grade the tracks of steam railroad. Pittsburg, etc., Ry. Co. *v.* Muncie & Portland Traction Co. (Ind.), 59.

Signals.

Duty of railroad to exercise care about warning travelers at crossings cannot be evaded by delegating its performance to others. Jones *v.* Pennsylvania R. Co. (N. J.), 244.

CROSSINGS—Continued.

Stop, Look, and Listen.

Negligence per se for highway traveler to fail to stop, look, and listen for trains. Clark *v.* St. Louis, etc., R. Co. (Okl.), 247.

Person about to cross railroad tracks is not necessarily negligent as matter of law in failing to continue to look and listen at all times for approaching trains, where he was misled by the railroad company, or his attention was rightfully directed to something else as well. Farris *v.* Southern Ry. Co. (N. Car.), 523.

Presumption that highway traveler did not look for train by which he was struck. Hamilton *v.* Central R. Co. (Pa.), 265.

Question for jury whether driver should stop, look, and listen before crossing tracks of street railway. Talley *v.* Chester Traction Co. (Pa.), 339.

Street car tracks. McCormick *v.* Ottumwa Ry. & L. Co. (Iowa), 350.

Traveler was not necessarily negligent because he did not look at the most advantageous point, and where, if he had taken heed, he probably would have seen an oncoming train, and avoided injury. Wallenburg *v.* Missouri Pac. Ry. Co. (Neb.), 340.

DAMAGES.

See CARRIERS; DEATH BY WRONGFUL ACT; PERSONAL INJURIES; STREET RAILWAYS.

DEATH BY WRONGFUL ACT.

Contributory Negligence.

Of deceased will not bar recovery for his death unless it contributed proximately to his death. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

Damages.

Admissibility of evidence that intestate had persons who would have been distributees, had he left an estate, dependant on him for support, and the amount he contributed to their support. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

What may be considered in assessing penalty under Mo. Rev. St. 1899, § 2864. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.

Parties.

Under certain statute, mother of deceased was necessary party plaintiff to action for his death, even though she may not individually have sustained any pecuniary loss through his death. Missouri, etc., Ry. Co. *v.* Foreman (C. C. A.), 491.

EMINENT DOMAIN.

See STREET RAILWAYS.

Certain section of statute in question grants in express terms to interurban railroads all the powers possessed by steam railroad companies to condemn property. State *v.* Williams (Mo.), 50.

Condemn lands for railroad purposes, prerequisites of right to. State *v.* Williams (Mo.), 50.

Damages.

Presumption that damages occasioned by the taking and appropriation of property are capable of ascertainment and compensation in a court of law. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

The constitutional requirement that damages must be first ascertained and just compensation made before property is taken

EMINENT DOMAIN—Continued.

for public use has no application to the use by a private owner of his own property. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

Under Minn. Const. Art. 6, § 13, only a single action or assessment and payment of damages is contemplated. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

Individual as well as a corporation may operate a railroad, though he can have no power to acquire land by eminent domain for railroad purposes. People *v.* Erie R. Co. (N. Y.), 587.

Injunction.

Certain sections of Minn. Civ. Code do not authorize enjoining a railroad company from the operation of a road on its own premises until payment of damages to other property in the neighborhood. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

Court of equity, in proper case, will enjoin a threatened trespass or injury, consisting of the taking of private property for public use without just compensation. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

Where public officers are threatening to make an illegal and permanent appropriation of private property to public uses. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

Will not lie to restrain a railroad from making improvements on its own property without first proceeding, by condemnation action, to assess and pay consequential damages, when such damages are already accrued and a proper remedy exists in an action at law. Hyde *v.* Minnesota, etc., Ry. Co. (S. Dak.), 299.

It does not concern owners of city property sought to be condemned for railroad purposes that the company cannot use the streets without being duly authorized. State *v.* Williams (Mo.), 50.

Power of railroad company to construct and operate its road cannot be questioned in condemnation proceedings. State *v.* Williams (Mo.), 50.

Public Use.

If a use is public, its extent is immaterial upon the exercise of the right of eminent domain. Dubuque, etc., Co. *v.* Ft. Dodge, etc., R. Co. (Iowa), 292.

Spur track to be used mainly to carry freight for manufacturing company. Dubuque, etc., R. Co. *v.* Ft. Dodge, etc., R. Co. (Iowa), 292.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS; INTERSTATE COMMERCE.

Application of Statutes.

Ala. Code, 1896, § 1749, subd. 5, applies to electric street railways. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

Blacksmith engaged in construction of railroad bridge, and injured by act of fellow servant in letting coil of rope fall while they are both in camp, is not injured in the "operation of a railroad," with the meaning of N. Car. Revisal 1905, § 2646. O'Neal *v.* South & W. R. Co. (N. Car.), 586.

Certain company was a railroad, though its chief purpose was to exploit certain timber land and market the timber thereon and therefore subject to certain fellow-servant act. Wright *v.* Caney River Ry. Co. (N. Car.), 29.

Mont. Rev. Codes, § 5251, making a railroad liable for injuries to any employee caused by the negligence of any other employee,

EMPLOYERS' LIABILITY ACTS—Continued.

etc., has no application to a case of a violation by a railroad of a primary duty not within the scope of the employment of an employee. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Railroad employee, injured while serving as member of bridge gang from the falling of bridge piles, has no cause of action under Burns' Ann. St. 1908, § 8017. Cleveland, etc., Ry. *v.* Foland (Ind.), 212.

To bring a case within certain railway fellow servant act, it must appear that the servant was injured while performing a service necessary to and connected with the operation of the railway as a common carrier. O'Neal *v.* South & W. R. Co. (N. Car.), 586.

Where section gang, while engaged in repairing track, are lifting their push car from the track upon the approach of a train, and one of them negligently drops his corner of the car, injuring another member of the gang, such negligence is connected with the "operation" of the railroad. Cahill *v.* Illinois Cent. R. Co. (Iowa), 618.

Compliance with Statutes.

Locomotive used in interstate commerce need not have automatic couplers at both ends, to comply with Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531, where one end only is coupled to other cars. Wabash R. Co. *v.* United States (C. C. A.), 505.

Requirement of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531, is absolute. Wabash R. Co. *v.* United States (C. C. A.), 505.

Constitutionality of S. Dak. Laws 1907, c. 219, which excepts from the general law of the state all common carriers and all their employees, subjects the former to and grants to the latter causes of action for injuries to the employees caused by the negligence of their fellow servants, and for those to which their own negligence contributes, etc. Chicago, etc., Ry. Co. *v.* Westby (C. C. A.), 270.

Constitutionality of statute imposing liability upon railroads for injuries to employees, who are free from fault, through the negligence of coemployees. Florida E. C. Ry. Co. *v.* Lassiter (Fla.), 577.

Hours of labor of certain railroad employees, validity of N. Y. Consol. Laws, c. 31, § 6, limiting. People *v.* Erie R. Co. (N. Y.), 587.

Mont. Rev. Code, § 5251, abolishes the fellow servant rule without defining the relation of master and servant. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

S. Dak. Laws 1907, § 219, may not be limited by construction to a constitutional class. Chicago, etc., Ry. Co. *v.* Westby (C. C. A.), 270.

EVIDENCE.

See CARRIERS OF PASSENGERS.

In action against railroad for death of a switchman of another company, by backing train through the yards in the night time without light or warning, evidence is admissible to show the distance between defendant's train and a person operating the switch, though there is no claim that the switch was too close to the track. Jackson *v.* Detroit & M. Ry. Co. (Mich.), 486.

Opinion Evidence.

Jury are not bound to believe that train could be stopped within

EMPLOYERS' LIABILITY ACTS—Continued.
a given space merely because a witness so testified. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.
Opinion evidence as to whether a rail at a curve was an inch higher than the other. Gardner *v.* Metropolitan St. Ry. Co. (Mo.), 448.
Witnesses, while not knowing the engine or cars of train, but having run other trains, are competent to testify as to the distance within which such a train could be stopped. Chesapeake & O. Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

EXPRESS MESSENGERS.
See CARRIERS OF PASSENGERS.

FEDERAL COURTS.
Question of liability of employer for injury to employee is one of general law, as to which the federal courts are not bound by decisions of state courts. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

FEDERAL JURISDICTION.
Removal of Cause.
Suit in which plaintiff has joined foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of, did not present a separable controversy between plaintiff and the corporate defendant. Southern Ry. Co *v.* Miller (U. S.), 189.

FELLOW SERVANTS.
See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.
Comprehensive statement of the fellow servant rule recognized by federal courts. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Different Department Limitation.
Different department limitation. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.
Is not favored by federal courts. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.
Settled rule in federal courts that an employer is not liable for an injury to an employee occasioned by the negligence of another employee engaged in same general undertaking, etc. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.
Master is not liable for negligence of fellow servant in common employment. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.
Test of applicability of the fellow servant doctrine is not whether the injury was received by the servant during working hours, or when he was at work after working hours, but whether he was doing something which it was his duty or he had a right to do under his contract of employment. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Vice Principals.
Employee to whom is delegated the duty to disconnect and make safe electric wires on which others must work. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.
Foreman of bridge gang ordering members of the gang to unfasten pilings which had been nearly sawed off by a co-employee, where by the latter was injured by a falling pile, is not a vice principal at common law, since there was no neglect of the master of any duty intrusted to the foreman. Cleveland, etc., Ry. Co. *v.* Foland (Ind.), 212.

FELLOW SERVANTS—Continued.

Question for jury whether person temporarily in charge of defendant's business was one whose principal duty was that of superintendence, within Massachusetts employers' liability statute. Wellington *v.* Pelletier (C. C. A.), 514.

Rank given a servant is not controlling on whether he is a vice principal under the common law. Cleveland, etc., Ry. *v.* Foland (Ind.), 212.

Who are. Cleveland, etc., Ry. *v.* Foland (Ind.), 212.

Who Are.

Conductor on cable car operated on a street and motorman on an electric car operated by same company on a street crossing the first at right angles. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.

Defendant railroad was not chargeable with notice of the dangerous condition of the engine in question, which caused its brakeman's injury, where the negligence with respect to which, was that of the engineer or conductor, who were his fellow servants. Delaware, etc., R. Co. *v.* Royce (C. C. A.), 217.

Foreman and his switching crew. Berglund *v.* Illinois Cent. R. Co. (Minn.), 26.

"Learner fireman" and other trainmen. Smith *v.* Western & A. R. Co. (Ga.), 230.

Men employed by railroad to load cars, where each man is paid according to the work done, and each works separately and independently of the others in different places, and have control over the work, are not fellow servants. Missouri, etc., Ry. Co. *v.* Romans (Tex.), 22.

Motorman of one street car and conductor of another. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

One having general control and supervision of railroad repair work was a vice principal with respect to laborers employed to do the work. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

Question of law and fact. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.

Signalman, injured by block of ice kicked off moving train by baggageman, was fellow servant of latter. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Switchman employed in yard of one railroad company is not a fellow servant of the train crew of another road operating its trains through the same yard. Jackson *v.* Detroit & M. Ry. Co. (Mich.), 486.

Trainmen and other employees riding to work on the train. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

FIRES SET BY LOCOMOTIVES.

See COMMON CARRIERS; JUDICIAL NOTICE; MASTER AND SERVANT.

Destruction of freight, delivered to carrier on its right of way under special contract, seems to have been a casualty necessarily incident to its location in close proximity to passing engines. Ashley *v.* Central of Georgia Ry. Co. (Ga. App.), 419.

Evidence.

Circumstantial evidence of origin of fire. St. Louis, etc., R. Co. *v.* Shannon (Okl.), 74.

Of setting of other fires by other locomotives. St. Louis, etc., R. Co. *v.* Shannon (Okl.), 74.

Proximate Cause.

Sufficiency of evidence to go to jury on question whether negli-

FIRES SET BY LOCOMOTIVES—Continued.
gence of the section crew in setting out the fire or the sudden springing up of the wind was the proximate cause of the injury. Alabama & V. Ry. Co. *v.* Baldwin (Miss.), 653.

FOREIGN CARS.
See ATTACHMENT.

FRAUD.
See CARRIERS OF PASSENGERS.

FRIGHTENING TEAMS.

Damages.
Evidence showed intentional violation of ordinance in permitting engines to stand on crossing, authorizing punitive damages for injuries resulting from frightening horse. Lindler *v.* Southern Ry. Co. (S. Car.), 334.
Liability of railroad, on account of obstructing crossing with train or cars contrary to an ordinance, for injuries sustained by one while attempting to drive around the obstruction. Lindler *v.* Southern Ry. Co. (S. Car.), 334.
Question whether locomotives were at such a place as to render the crossing dangerous by frightening horses, and the question whether the negligence and manner of their operation proximately caused the injury in question, were for jury. Lindler *v.* Southern Ry. Co. (S. Car.), 334.
Unnecessarily or wantonly blowing whistle or allowing steam to escape, in violation of statute, liability on account of. Lindler *v.* Southern Ry. Co. (S. Car.), 334.

GARNISHMENT.
Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments. Davis *v.* Cleveland, etc., R. Co. (U. S.), 92.

GROSS NEGLIGENCE.
See NEGLIGENCE.

HOURS OF LABOR.
See EMPLOYERS' LIABILITY ACTS.

IMPUTED NEGLIGENCE.
In action for personal injuries in a collision between street car and ice wagon, upon which plaintiff was employed, negligence of driver could not be imputed to plaintiff, in absence of a certain showing. Cathey *v.* Seattle Electric Co. (Wash.), 403.
Negligence of driver of fire engine constituted no bar to right of city to recover against railroad for injury caused by a locomotive running into the engine at a crossing. Mayor, etc. *v.* Erie R. Co. (N. J.), 261.

INDEPENDENT CONTRACTORS.
See NUISANCES.
Employer's liability for torts of independent contractor. Louisville & N. R. Co. *v.* Hughes (Ga.), 1.

Who Are.
Contract in question made the parties who contracted to do the work specified for the railroad company independent contractors. Louisville & N. R. Co. *v.* Hughes (Ga.), 1.

INSOLVENCY.
See RECEIVERS.

INTERSTATE COMMERCE.
See ATTACHMENT; GARNISHMENT; RAILROAD COMMISSIONS.

Burden of Proof.
In action against carrier for the penalty for failure to receive and transport an interstate shipment, plaintiff does not have to show that defendant has filed and published its schedule of freight rates as required by law. Burlington Lumber Co. *v.* Southern Ry. Co. (N. Car.), 413.
Can be regulated exclusively by Congress, but the regulation is within and for the benefit of the states and their citizens. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

Discrimination.
Interstate commerce act allows differential and discriminative rates, when does the. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.
Jurisdiction of state court to enforce, in rebuttal of a defense set up under a bill of lading, the provisions of Interstate Commerce Act making a carrier liable to the holder of the bill of lading for any loss caused by it or any connecting carrier. Pittsburg, etc., Ry. Co. *v.* Mitchell (Ind.), 760.

State Interference.
Common carrier using car in violation of certain safety appliance act of Ohio is not immune from the penalty therein provided because the car, or the railroad on which it was being hauled, is commonly used in interstate traffic, or because it was a train containing cars loaded with interstate traffic. Detroit etc., Ry. Co. *v.* State (Ohio), 625.
Constitutionality of statute making it the carrier's duty to supply cars to shippers on demand, etc. St. Louis S. W. Ry. Co. *v.* Arkansas (U. S.), 83.
Validity of certain Labor Law of New York. People *v.* Erie R. Co. (N. Y.), 587.
Validity of statute imposing penalty on carriers for refusal to accept shipments of freight. Burlington Lumber Co. *v.* Southern Ry. Co. (N. Car.), 413.
Validity of § 3365—27b. Rev. St. of Ohio, making it unlawful for any common carrier engaged in moving traffic by railroad between points within this state to haul, etc., any locomotives, etc., not equipped with automatic couplers. Detroit, etc., Ry. Co. *v.* State (Ohio), 625.

JOINT TRACK AGREEMENTS.
See NEGLIGENCE.

JUDICIAL NOTICE.
May be taken of the fact that all railroads of the state to which the Labor Law, regulating the hours of labor for telegraph and telephone operations, applies, are, and must be, operated by corporations. People *v.* Erie R. Co. (N. Y.), 587.
That it is the duty of a section master to supervise railroad right of way and keep it in proper condition, so that fires will not extend from it to property of others, and to extinguish such fire. Alabama & V. Ry. Co. *v.* Baldwin (Miss.), 653.

JURISDICTION.
See FEDERAL JURISDICTION; INTERSTATE COMMERCE.

LAST CLEAR CHANCE.
See MASTER AND SERVANT.

LEASES AND RUNNING POWERS.
See RECEIVERS; TICKETS AND FARES.

LICENSEES.

Contributory Negligence.
The mere fact that a person driving upon an elevated roadway beside station platform knew that such way was defective for lack of a railing, and, so knowing, used it, did not render him guilty of contributory negligence. Louisville & N. R. Co. *v.* Morgan (Ala.), 318.

Degree of Care.
While railroad was not an insurer of his safety, plaintiff, when driving upon elevated wagonway beside station platform for freight, was entitled to the protection of a railing, and, if its absence was the proximate cause of injury resulting from his horse shying, the railroad was liable. Louisville & N. R. Co. *v.* Morgan (Ala.), 318.
Where plaintiff, who went to defendant's station for freight, drove upon an elevated wagonway beside the platform, which way had no railing, and was injured, owing to one of his mules becoming frightened, the question of negligence and contributory negligence were for jury. Louisville & N. R. Co. *v.* Morgan (Ala.), 318.

Who Are.
Child of railroad employee, when on the track near residences maintained by the company for its employees, was more than a mere licensee, and the railroad was liable for injuries to it occasioned by simple negligence in the operation of its train. Young *v.* Southern Ry. Co. (Miss.), 183.
Person assisting passenger to board or alight from train. Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 661.

MAIL CLERKS.
See CARRIERS OF PASSENGERS.

MALPRACTICE.
See MASTER AND SERVANT.

MASTER AND SERVANT.
See EMPLOYERS' LIABILITY ACTS; FEDERAL COURTS; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LICENSEES.

Accidents on Track.
Negligence in making flying switch in railroad's yards across pathway which its employees were accustomed to use in going to and from their boarding houses. Farris *v.* Southern Ry. Co. (N. Car.), 523.
Notice to railroad of the custom of its employees to cross its yards and tracks on a path to reach their homes and boarding places. Farris *v.* Southern Ry. Co. (N. Car.), 523.

MASTER AND SERVANT—Continued.

Appliances.

All that the law imposes upon a master in this respect is the duty to exercise reasonable care to furnish and maintain safe appliances. Delaware, L. & W. R. Co. *v.* Royce (C. C. A.), 217.

Defendant railroad's negligence was question for jury because of testimony that the defective condition of the eccentric strap on the engine in question was previously reported to defendant, and that the bolts by which the eccentric straps were attached were old and thread-worn, and because of the occurrence of the accident within a short distance of the place of inspection. Koreis *v.* Minneapolis, etc., R. Co. (Minn.), 256.

Employer must furnish reasonably safe appliances to work with. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.

Railroad was not liable for injuries to servant whose hand, while she was attempting in the performance of her duties as car cleaner to raise a car window which had become fast and the pull of which was worn smooth, slipped and went through the glass. House *v.* Southern Ry. Co. (N. Car.), 508.

The rule requiring master to provide reasonably safe and suitable appliances does not as a rule apply to the use of ordinary every day tools. House *v.* Southern Ry. Co. (N. Car.), 508.

Assaults.

Special police officer was assigned to duty on defendant railroad's pier to regulate traffic, and committed an unjustifiable assault on plaintiff in a public street leading to the pier, the fact that defendant paid such patrolman's wages for keeping order on its premises did not render it liable for the assault, where. Pennsylvania R. Co. *v.* Kelly (C. C. A.), 651.

Wantonness, act of railroad's watchman in shooting trespasser constituted. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

Assumption of Risk.

Engineer assumed risk of attempting to operate temporarily repaired engine until it reached his next station, was question for jury whether. Koreis *v.* Minneapolis, etc., R. Co. (Minn.), 256.

Engineer does not generally assume risk of defects in roadbed. Smith *v.* Chicago, etc., Ry. Co. (Kan.), 640.

Fellow servant's negligence. Pittsburgh Rys. Co. *v.* Thomas (C. C. A.), 36.

Freight conductor, occupying his caboose while on a side track in railroad yard while his train was being made up by yard crew did not assume the risk from the negligence of the yard crew in handling cars in the yard. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

General rule. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.

Incompetent fellow servant, negligence of master in employing. Pittsburgh Rys. Co. *v.* Thomas (C. C. A.), 36.

Likelihood of human infirmity in fellow workman. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.

Negligence of employer. Leggitt *v.* Atlantic C. L. R. Co. (N. Car.), 636.

Section hand riding velocipede on track, knowing of approach of train, jumped off, and was safe, and then attempted to get his velocipede off track, when it was too late to avoid injuring him, assumed the risk, whether. Chesapeake, etc., Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

MASTER AND SERVANT—Continued.

Burden of Proof.

Burden on plaintiff of proving that his injuries were caused by his master's negligence in employing or retaining an incompetent servant. Pittsburgh Rys. Co. *v.* Thomas (C. C. A.), 36.

In action for death of conductor of freight train, caused by his being caught between cars of parted train, in absence of some evidence to show what caused the engine to move, and that it was due to some act of negligence on the part of the railroad, it could not be held liable. Missouri, etc., Ry. Co. *v.* Foreman (C. C. A.), 491.

Cause of action by an injured servant against master, what gives rise to. Cleveland, etc., Ry. Co. *v.* Foland (Ind.), 212.

Contributory Negligence.

Deceased employee was not chargeable with contributory negligence because he did not keep a constant lookout for trains, while making a trench between rails of private spur track which led from railroad siding to his employer's quarry. Wellington *v.* Pelletier (C. C. A.), 514.

Employee struck by coal chute post too near track while alighting from engine steps. Heilig *v.* Southern Ry. Co. (N. Car.), 501.

Employees were making repairs under car, situation was not so manifestly dangerous that it could be said as a matter of law that persons of ordinary prudence would not have undertaken the work, where. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Engineer has right to assume that his company has discharged its obligation to him to keep the ties and rails of the track in reasonably safe repair. Smith *v.* Chicago, etc., Ry. Co. (Kan.), 640.

Engineer is justified in operating temporarily repaired engine until it reaches his next station, whether. Koreis *v.* Minneapolis, etc., R. Co. (Minn.), 256.

Engineer owes a duty to the public, as well as to his employer, and is justified in taking much greater risks than employees in other occupations without necessarily forfeiting the right of action for injuries resulting from his master's negligence, of which he had knowledge. Koreis *v.* Minneapolis, etc., R. Co. (Minn.), 256.

Engineer was not guilty of contributory negligence, as matter of law, in attempting to operate temporarily repaired engine to his next station. Koreis *v.* Minneapolis, etc., R. Co. (Minn.), 256.

Engineer's right to proceed on the trip with defective engine in reliance on the promise of roundhouse foreman to repair the defect or to send a needed appliance, where a rule required engineers before starting on a trip to examine their engines. Great Northern Ry. Co. *v.* McDermid (C. C. A.), 519.

In action for death of railroad employee killed by a flying switch while crossing tracks on customary path, the question of his contributory negligence was for jury. Farris *v.* Southern Ry. Co. (N. Car.), 523.

Member of carpenter force occupying camp cars was not negligent as matter of law in attempting to go from one car to another, especially where he knew that the engine and certain cars had been detached, if he received no warning that they were approaching to make a coupling with the stationary camp cars. Chesapeake & O. Ry. Co. *v.* Nash (Ky.), 511.

Presume that their foreman had taken, or would take, sufficient

MASTER AND SERVANT—Continued.

precautions for their safety, right of employees making repairs under car to. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Question for jury whether conductor on cable car, injured in a collision with an electric car at a crossing, was guilty of contributory negligence. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.

Rely on judgment of their foreman as to danger of injury in work he orders them to do, employees' right to. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Remaining in employment in reliance on promise to repair defect in machine or appliance. Great Northern Ry. Co. *v.* McDermid (C. C. A.), 519.

Sectionman, after dismounting from his railroad velocipede on the approach of a train and reaching place of safety, returning to remove the velocipede, and thereby meeting his death. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.

Street railway may not make a schedule for car of a motorman, and also make a rule which makes the schedule impossible under ordinary conditions, and then hold him negligent in doing that which is necessary to make the schedule. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

Custom and Usage.

Custom of railroad employees to do work in a particular manner binding on the company, when is the. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Railroad was chargeable with knowledge of custom of its employees to ride on engine between certain stations in the discharge of their duties. Heilig *v.* Southern Ry. Co. (N. Car.), 501.

Degree of Care.

Duty to use reasonable care to transport railroad employees safely when they are riding on engine in the discharge of their duties, according to custom. Heilig *v.* Southern Ry. Co. (N. Car.), 501.

Railroad company owes its sectionman who is guilty of contributory negligence in the performance of his work of inspecting track no greater duty to have its engineer avoid injuring him, after discovering his peril, than it owes a trespasser. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.

Required of master for servant's safety. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

With respect to the operation of its road, railroad owes to its employees only the duty to exercise ordinary care to provide a sufficient number of reasonably competent employees, make proper rules for their government, and exercise proper supervision over them. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Discovered Peril.

Degree of care required of engineer after discovering the peril of a section hand on the track. Chesapeake, etc., Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

Section hand on velocipede was struck by train which gave no warning of its approach, of which he was ignorant, and the speed of which might have been checked after he was seen by the engineer in time to avoid the accident, direction of verdict for railroad was properly refused where. Chesapeake, etc., Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

Section hand, while riding velocipede by permission, was struck by a train outside of town, railroad was liable only in case

MASTER AND SERVANT—Continued.

there was negligence after his peril was discovered where its. Chesapeake, etc., Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

Though section hand was guilty of negligence in going on track with his velocipede knowing that a train was coming, his company was liable for his death from being struck by the train, if, after it discovered his peril, it did not exercise ordinary care to avoid injuring him. Chesapeake, etc., Ry. Co. *v.* Lang's Adm'x (Ky.), 630.

Employment of Fellow Servant.

Evidence of previous specific acts of servant, indicating incompetency, which were or should have been known to the master, admissibility of. Pittsburg Rys. Co. *v.* Thomas (C. C. A.), 36.

Evidence that motorman's reputation for competency as a motorman, among the conductors and motorman who daily congregated to the number of 30 or 40 in the car barn, was bad was admissible, where it was claimed that it was negligence to employ him. Pittsburg Rys. Co. *v.* Thomas (C. C. A.), 36.

Master is liable for failure to exercise the care of an ordinarily prudent man to select servants competent for the performance of duties required of them. Pittsburg Rys. Co. *v.* Thomas (C. C. A.), 36.

Prior specific acts of negligence to establish master's negligence in retaining the servant in question in his employ, sufficiency of. Pittsburg Rys. Co. *v.* Thomas (C. C. A.), 36.

Question for jury, in action for injuries to street car conductor by the alleged negligence of his motorman, whether railroad was negligent in employing the motorman or retaining him in its employ with knowledge of his incapacity. Pittsburg Rys. Co. *v.* Thomas (C. C. A.), 36.

Evidence.

Rule imposing duty on servant, best evidence of existence of. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.

Evidence warranted the court to submit to jury the question of the negligence of the superintendent of the railroad repair work in question in causing a collision between the train under his control and certain box cars. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

Last Clear Chance.

Issue of was properly submitted in action for death of railroad employee, killed while crossing tracks in yards by flying switch. Farris *v.* Southern Ry. Co. (N. Car.), 523.

The case in question was one in which the master is liable only if the trainmen saw decedent in time to have avoided the accident under the conditions and the means at hand and failed to do so. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.

Ordinance regulating the speed of street cars is not for the benefit of employees operating cars. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

Pleading.

Declaration, in action for injuries to servant through the negligence of a co-servant, must expressly allege that the latter was not a fellow servant of former. Bennett *v.* Chicago City Ry. Co. (Ill.), 42.

Presumption of Negligence.

Fact of Accident in which railroad employee is injured carries

MASTER AND SERVANT—Continued.

with it no presumption of negligence on the part of company. Missouri, etc., Ry. Co. *v.* Foreman (C. C. A.), 491.

Head-on collision between trains, whereby a railroad employee is injured. Duvall *v.* Seaboard A. L. Ry. (N. Car.), 532.

Presumptions.

Railroad is conclusively presumed to have knowledge of unsafe condition of its tracks. Leggett *v.* Atlantic Coast Line R. Co. (N. Car.), 636.

Proximate Cause.

Evidence sustained finding that bad condition of track and violent jarring of cars threw brakeman between cars, causing his death. Leggett *v.* Atlantic Coast Line R. Co. (N. Car.), 636.

Where cars were negligently left on side track at top of grade by defendant's employees without being secured except by the setting of the brakes, and one of such cars ran down upon and killed plaintiff's intestate, the fact that the brake was released by children playing about the cars did not prevent defendant's negligence from being the proximate cause of the injury. Wellington *v.* Pelletier (C. C. A.), 514.

Release.

Validity of release of damages executed by an injured servant, on condition that he be re-employed for indefinite time by the master. Tindall *v.* Northern Pac. Ry. Co. (Wash.), 573.

Where injured servant executed a release of damages, and was reinstated in his employment, and continued therein, the contract was an executed one, and the servant could not thereafter complain that the release was not signed by the maser. Tindall *v.* Northern Pac. Ry. Co. (Wash.), 573.

Relief Department.

Malpractice or negligence of surgeons and attendants, liability of railroad on account of. Barden *v.* Atlantic C. L. Ry. Co. (N. Car.), 558.

Validity of rules of railroad's relief department, exempting the company from liability to a member for injuries resulting for its negligence, as a condition precedent to the member's right to benefits. Barden *v.* Atlantic C. L. Ry. Co. (N. Car.), 558.

Rules.

Rule should be construed in favor of railroad's employee. Great Northern Ry. Co. *v.* McDermid (C. C. A.), 519.

That rule, forbidding switchmen to mount foot-board of moving engine, had been disregarded in practice, may be shown under the issues of assumption of risk and contributory negligence. Berglund *v.* Illinois Cent. R. Co. (Minn.), 26.

Scope of Employment.

Act of railroad baggage man, while tending to local freight, in stepping into express car. Duvall *v.* Seaboard A. L. Ry. (N. Car.), 532.

Freight conductor, while occupying caboose of his train at night while awaiting the call to go on duty, was in the discharge of his duties, though his pay stopped on his registering on his arrival. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Master may be liable for act of servant, though it be in excess of the authority conferred by master or in violation of his express directions, provided it was not done in furtherance alone of the servant's personal ends. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

MASTER AND SERVANT—Continued.

Railroad floating gang employee returning from work on his company's engine. Heilig *v.* Southern Ry. Co. (N. Car.), 501.

Railroad section foreman, on Sunday and when not working for his company, by sending men not in its employ with hand car for water for the foreman's private use at his house, could not render the company liable for injury sustained by one of the men while so riding on the hand-car. St. Louis, etc., Ry. Co. *v.* Robinson (Ark.), 534.

Section master's duty to prevent the spread of fire from railroad right of way. Alabama & N. Ry. Co. *v.* Baldwin (Miss.), 653.

Trespasser shot by railroad's watchman. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

Servant's Liability.

Liability of foreman of railroad yard for injuries to freight conductor occasioned by failure to properly secure cars placed on inclined side track terminating at an excavation, occurring when the foreman was not actively on duty. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Signalman injured by block of ice kicked from moving train by direction of station agent, railroad was not liable unless station agent had authority from it to give such directions, or there was a custom to so deliver ice, so general as to be presumed to have been known to the railroad, where. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Structures Near Track.

Duty of railroad to move coal chute posts out of the way, for the safety of employees who are riding on engines, according to custom, when larger engines are in use than those employed by the company when the coal chutes were built. Heilig *v.* Southern Ry. Co. (N. Car.), 501.

Sufficiency of allegation of negligence of conductor of car, in action for death of motorman in a collision. Birmingham, etc., Co. *v.* Moseley (Ala.), 4.

Waiver by railroad of the failure of injured engineer to give 30 days notice in writing of his claim for personal injuries, required by contract of employment. Smith *v.* Chicago, etc., Ry. Co. (Kan.), 640.

Warn and Instruct.

Duty of engineer of detached engine and cars to warn employees occupying camp cars of the return of such engine to make coupling. Chesapeake & O. Ry. Co. *v.* Nash (Ky.), 511.

Who Are Employees.

"Learner fireman." Smith *v.* Western & A. R. Co. (Ga.), 230.

"Learner fireman" injured while on engine by virtue of unauthorized permit. Smith *v.* Western & A. R. Co. (Ga.), 230.

"Learner fireman" when injured while on engine was an employee, sufficiency of evidence that. Smith *v.* Western & A. R. Co. (Ga.), 230.

Public police officer specially employed by common carrier of passengers to perform certain services for it. Layne *v.* Chesapeake & O. Ry. Co. (W. Va.), 537.

Sleeping car company's employees are employees of railroad company. Denver, etc., R. Co. *v.* Derry (Colo.), 141.

Special officer appointed by the Governor for police duty, at instance of railroad company, under authority conferred by certain statute, is prima facie a public officer. Layne *v.* Chesapeake & O. Ry. Co. (W. Va.), 537.

MASTER AND SERVANT—Continued.

Where defendant railroad was rightfully using the tracks of plaintiff's employer, plaintiff was not a "quasi employee" of defendant, within certain statute. Hunt *v.* Philadelphia & R. Ry. Co. (Pa.), 490.

Work Place.

After railroad has performed its duties to its employees with respect to the operation of the road, it is not liable for an injury to an employee in the operation of the road through the negligence of other employees in the operating department, or for their failure to observe the rules, although such negligence make the place in question unsafe to work in. Illinois Cent. R. Co. *v.* Hart (C. C. A.), 220.

Degree of care required of master to furnish safe work place. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

Employees were making repairs under car, situation was such that it could not be said that some precautions should not have been taken for their safety, where. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Employer must provide reasonably safe place to work. Massy *v.* Milwaukee Elec. Ry. & L. Co. (Wis.), 656.

Foreman of railroad yard was not personally responsible for an unguarded excavation at end of a side track in the yard because it was a primary duty of the railroad to take precautions with reference thereto. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Its employee was injured while at work under box car on its private switch when other cars were pushed against it by trainmen of railroad company, facts alleged showed cause of action against defendant manufacturing company, where it averred that. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Maintenance of the uncovered farm crossing in question was not negligence, since the railroad in the exercise of reasonable care could not be chargeable with knowledge that the crossing would be a menace to its employees. Maue *v.* Erie R. Co. (N. Y.), 232.

Master need exercise only reasonable care in providing safe place in which to work, and is not liable for mere error of judgment, but only for culpable negligence. Maue *v.* Erie R. Co. (N. Y.), 232.

Railroad and its yard foreman, whose duty it was to see that proper precautions were observed to prevent caboose, in which freight conductor was properly awaiting the call to go on duty, from falling into unguarded excavation in yard, were liable for the conductor's injuries. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Rule requiring master to provide reasonably safe place to work does not as a rule apply to ordinary conditions requiring no special care or preparation. House *v.* Southern Ry. Co. (N. Car.), 508.

Time when railroad's duty to furnish its track repairers a safe work place began when they boarded a train to be carried to work. Jachetta *v.* San Pedro, etc., R. Co. (Utah), 13.

Uncovered underground farm crossing without regard to its use or location, it is not negligence per se for railroad to maintain. Maue *v.* Erie R. Co. (N. Y.), 232.

NEGLIGENCE.

See CARRIERS; CROSSINGS; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; FRIGHTENING

NEGLIGENCE—Continued.

TEAMS; IMPUTED NEGLIGENCE; INDEPENDENT CONTRACTORS; LICENSEES; MASTER AND SERVANT; ORDINANCES; SPURS AND SIDE TRACKS; STREET RAILWAYS; TRESPASSERS.

Actionable negligence, elements of. Wickert *v.* Wisconsin Cent. Ry. Co. (Wis.), 172.

All persons, in the exercise of their rights or in the performance of their duties, should act with a reasonable regard for the preservation of human life, etc. Bragg's Adm'x *v.* Norfolk & W. Ry. Co. (Va.), 438.

An act is not necessarily not negligent because inadvertent. Cahill *v.* Illinois Cent. R. Co. (Iowa), 618.

Burden of Proof.

Though several acts of negligence are alleged in the complaint, proof of all is not required. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Concurring Negligence.

Where there was concurring negligence of plaintiff and defendant, liability depended upon whether defendant could have avoided the injury by the exercise of reasonable care under the circumstance. Farris *v.* Southern Ry. Co. (N. Car.), 523.

Gross Negligence.

Elements of. Martin *v.* Boston & N. St. R. Co. (Mass.), 703.

Joint track agreement in question did not relieve defendant railroad from liability for the negligence of its servants in operating trains on the joint track, resulting in a collision and injuries to a servant of the other railroad company. Atchison, etc., Ry. Co. *v.* Hamble (C. C. A.), 608.

Last Clear Chance.

Statement of doctrine. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Statement of rule of. Clark *v.* St. Louis, etc., R. Co. (Okl.), 247.

Mixed question of law and fact, when negligence is. Chesapeake & O. Ry. Co. *v.* Paris' Adm'r (Va.), 661.

Nature and elements of. Young *v.* St. Louis, etc., Ry. Co. (Mo.), 197.

Pleading.

Facts constituting negligence need not be set out. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Particular act of negligence relied on must be specified. Cary *v.* Los Angeles Ry. Co. (Cal.), 470.

Sufficiency of complaint in action against railroad for injury to person at work under box car on private switch track when other cars were pushed thereon. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

Presumptions.

Presumption of negligence may arise from the nature or manner of an injury. Cahill *v.* Illinois Cent. R. Co. (Iowa), 618.

Proximate Cause.

Definition of. House *v.* Southern Ry. Co. (N. Car.), 508.

Definition of. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

Question for jury. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

Question for court or jury, whether. Denver City Tramway Co. *v.* Wright (Colo.), 360.

NEGLIGENCE—Continued.

Variance.

Allegation that railroad and its employees negligently permitted cars to be on a certain track without setting the brakes, and that they negligently drove the cars against a caboose in which was a freight conductor, is sustained by evidence that the cars escaped after they were left standing on the track, and ran against the caboose, and moved it so that it fell into an excavation at the end of the track. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Violation of ordinance is negligence per se. Lindler *v.* Southern Ry. Co. (S. Car.), 334.

Wantonness.

Wanton, definition of. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

Where defendant was required to move its train from station to station on the track of another company, under orders of latter's train dispatcher, defendant would not be liable for injuries resulting from the negligence of the dispatcher, but, if a collision occurred not attributable to the dispatcher's orders, but to the negligence of defendant's employees, defendant's liability would attach. Atchison, etc., Ry. Co. *v.* Hamble (C. C. A.), 608.

Willfulness.

Willful, definition of. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

NUISANCES.

Independent contractor's negligence, railroad's liability for nuisance caused by. Louisville & N. R. Co. *v.* Hughes (Ga.), 1.

ORDINANCES.

See MASTER AND SERVANT.

PASSES.

See CARRIERS OF PASSENGERS; TICKETS AND FARES.

PENAL STATUTES.

See CONSTITUTIONAL LAW; DEATH BY WRONGFUL ACT; INTERSTATE COMMERCE; TICKETS AND FARES.

PERSONAL INJURIES.

See ACCIDENTS ON TRACK; CARRIERS; CHILDREN; CROSSINGS; DAMAGES; DEATH BY WRONGFUL ACTS; LICENSEES; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

Contributory Negligence.

Proximate cause. Southern Ry. Co. *v.* Harrington (Ala.), 148.

Damages.

Certain instruction properly charged on measure of damages for loss of earning capacity. Moyse *v.* Northern Pac. Ry. Co. (Mont.), 686.

Jury should be instructed that, in estimating prospective future damages resulting from diminished earning capacity, they should reduce such damages to their present value, and that such present value only should be included in their verdict. Florida E. C. Ry. Co. *v.* Lassiter (Fla.), 577.

PLEADING.
See CARRIERS OF PASSENGERS; MASTER AND SERVANT; NEGLIGENCE.

POLICE OFFICERS.
See MASTER AND SERVANT.

POLICE POWER.
See CONSTITUTIONAL LAW; EMPLOYERS' LIABILITY ACTS.

POSTAL CLERKS.
See CARRIERS OF PASSENGERS.

PRESCRIPTION.
See ADVERSE POSSESSION.

PRIVATE CARRIERS.
See COMMON CARRIERS.

RAILROAD COMMISSIONS.
See COMMON CARRIERS.
Application of rule 15 A of Railroad Commissioners of Florida. State *v.* Atlantic Coast Line R. Co. (Fla.), 108.

Interstate Commerce.
Commission establishing through routes, and joint rates. Interstate Commerce Commission *v.* Northern Pac. Ry. Co. (U. S.), 410.

Review by Courts.
Interstate Commerce Commission's determination upon the question whether "no reasonable or satisfactory through route exists" within the meaning of certain federal statute. Interstate Commerce Commission *v.* Northern Pac. Ry. Co. (U. S.), 410.

RAILROADS.
See ADVERSE POSSESSION; EMINENT DOMAIN; EMPLOYER'S LIABILITY ACTS.

Consolidation.
Merger of the corporations, so as to render grantee subject to an action for damages for a tort previously committed by the grantor, whether transfer of property by one corporation to another effects a. Louisville & N. R. Co. *v.* Hughes (Ga.), 1.
Railroads, right of a state to regulate. Atlantic C. L. R. Co. *v.* Coachman (Fla.), 775.

RAILROADS IN STREETS.
See EMINENT DOMAIN; STREET RAILWAYS.

RECEIVERS.
Trustee under deed for benefit of creditors, to whom railroad was leased to carry out the trust purposes, was liable to the extent of the trust property for negligent injury to employee of the railroad. Wright *v.* Caney River Ry. Co. (N. Car.), 29.

RELEASE.
See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

RELIEF DEPARTMENT.
See MASTER AND SERVANT.

REMARKS OF COUNSEL.
See TRIAL.

REMOVAL OF CAUSE.
See FEDERAL JURISDICTION.

RIGHT OF WAY.
See ADVERSE POSSESSION; EMINENT DOMAIN.

SLEEPING CAR COMPANIES.
See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

SPURS AND SIDE TRACKS.
Constitutionality of penal statute requiring construction and maintenance of side tracks or switches necessary to reach grain elevators. Missouri P. R. Co. *v.* Nebraska (U. S.), 79.
Order of Railroad Commission requiring railroad to construct spur track to certain private mill was a taking of its property without due process of law. Northern Pac. Ry. Co. *v.* Railroad Commission (Wash.), 598.
Trainmen of railroad company must anticipate presence of persons about car on private siding, not ready to be moved, in charge of the shipper, and should not bump against it without notice. Pittsburg, etc., Ry. Co. *v.* Schaub (Ky.), 644.

STATIONS AND DEPOTS.
See LICENSEES.

STOCK, INJURIES TO.
See FRIGHTENING TEAMS; TRESPASSERS.
Cows were killed by drinking oil leaking from oil cars placed on an unfenced space on its right of way, where it was not required to fence, liability of railroad where. St. Louis, etc., Ry. Co. *v.* Newman (Ark.), 331.

STREET RAILWAYS.
See CARRIERS OF PASSENGERS; CROSSINGS; EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Additional Servitude.
Street railway is not a strict use, but an additional burden placed on the land, for which the owner of the fee in the street is entitled to compensation. Rasch *v.* Nassau Elec. R. Co. (N. Y.), 296.

Collisions.
Evidence in action against street railway for causing death of bicyclist was sufficient to take questions of negligence and contributory negligence to jury. Denver City Tramway Co. *v.* Wright (Colo.), 360.
In action for personal injuries, sustained in a collision between street car and ice wagon, the cause was properly submitted to jury. Cathey *v.* Seattle Elec. Co. (Wash.), 403.

Contributory Negligence.
Burden of proving contributory negligence of traveler struck by street car while attempting to cross in front of it. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

STREET RAILWAYS—Continued.

Care required of user of street occupied by street railway. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Driver of vehicle was negligent as matter of law when attempting to drive across tracks in middle of block, and his vehicle was struck by car approaching from rear, after he had traveled on the street about 1,000 feet without looking or listening for cars. McCormick *v.* Ottumwa Ry. & L. Co. (Iowa); 350.

Error in instructions assuming that it is negligence per se to ride a bicycle between street car tracks, being favorable to defendant company, cannot be complained of by it on appeal. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Question for jury whether occupant of other vehicle was guilty of contributory negligence in failing to look for approaching car immediately before attempting to cross track. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

Right to cross or pass along between street car tracks. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Damages.

Where abutters do, and do not, own the fee in a street upon which it is proposed to build and operate a street railway. Rasch *v.* Nassau Elec. R. Co. (N. Y.), 296.

In action for injuries to plaintiff, by street car striking his buggy from the rear, the evidence required submission of the motorman's negligence to the jury. McCormick *v.* Ottumwa Ry. & L. Co. (Iowa), 350.

Last Clear Chance.

Rule was not applicable on the theory that the motorman's negligence in failing to discover plaintiff's peril before he did was the proximate cause of the accident. McCormick *v.* Ottumwa Ry. & L. Co. (Iowa), 350.

More care is essential to the proper operation of street cars than is usually required on the part of steam railroads. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

Mutual Rights.

And duties of street railway and other users of street, with respect to use of part of street covered by tracks. Carroll *v.* Boston Elev. Ry. (Mass.), 401.

Of street railway and travelers in use of streets. Palmer *v.* Port-Tramway Co. *v.* Wright (Colo.), 360.

Of street railway and travelers in use of streets. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.

Preferential right of street car over space occupied by its tracks. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Negligence.

He would have discovered in time that plaintiff was driving across tracks, if he had been observing, but increased speed of the car until he put on brakes just before the collision, motorman was guilty of negligence where. Fallon *v.* Boston Elev. Ry. Co. (Mass.), 372.

Negligence and contributory negligence were questions for jury, in action for injuries to occupant of wagon driving on right-hand side of street, by street car striking rear of wagon. Carroll *v.* Boston Elev. Ry. (Mass.), 401.

Pleading.

In action for injury to pedestrian struck by street car, plaintiff need not plead an ordinance relating to the sounding of a gong

STREET RAILWAYS—Continued.
etc., in order to avail himself thereof. Denver City Tramway Co. *v.* Wright (Colo.), 360.
Public may assume that in the operation of cars municipal ordinances will be observed. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.
Right of motorman to assume, and act on the assumption, that a pedestrian will turn out of the way of the car. Denver City Tramway Co. *v.* Wright (Colo.), 360.

Speed.
Evidence to show speed limit in city. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.
In violation or ordinance is negligence, question for jury whether. Palmer *v.* Portland Ry., etc., Co. (Ore.), 68.
It was the duty of the company not to exceed its schedule speed of 12 miles an hour at certain point. Denver City Tramway Co. *v.* Wright (Colo.), 360.
Objection of company that certain speed ordinance did not apply to the place of the accident was untenable. Denver City Tramway Co. *v.* Wright (Colo.), 360.
Was negligence for motorman to fail to slacken speed of the car on the occasion in question, or to stop it until he knew that the bicyclist was aware of his danger and would have ample time to protect himself therefrom. Denver City Tramway Co. *v.* Wright (Colo.), 360.

TAXATION.

Exemptions.
Bridge, built and operated by independent corporation established for that purpose, is not exempt from taxation as part of railroad, under certain proposed amendment to Louisiana Constitution, because used by certain railroad companies, which pay tolls for running their trains over it. Shreveport Bridge & T. Co. *v.* State Board of Appraisers (La.), 288.

TICKETS AND FARES.
See CARRIERS OF PASSENGERS.

Contributory Negligence.
Failure of passenger to observe conductor's mistake in retaining return part of round trip ticket. Louisville & N. R. Co. *v.* Fish (Ky.), 170.
One purchasing ticket at reduced rate may not recover the penalty prescribed by Mont. Rev. Codes, § 4330, requiring railroad, on tender of the "regular rates of fare," to furnish tickets, etc. Miley *v.* Northern Pac. Ry. Co. (Mont.), 176.

Passes.
Issuance of certain pass would not be in violation of N. H. Laws 1909, c. 126, since it cannot be presumed that the Legislature intended the act to have a retrospective effect. Emerson *v.* Boston & M. R. R. (N. H.), 700.
Validity of agreement where lessee of railroad agreed by the lease "to transport the stockholders of the lessor to and from their annual and special meetings free of charge," and at the time of the lease it was not prohibited by law or contrary to public policy. Emerson *v.* Boston & M. R. R. (N. H.), 700.

Time Limit.
Right to limit time within which passenger tickets will be valid. St. Louis, etc., R. Co. *v.* Johnson (Okl.), 165.

TICKETS AND FARES—Continued.

Who Are Passengers.

Where the issue was whether persons riding on a train were trespassers, because riding on a pass issued to others, the conductor of the train may testify as to what a passenger must have to entitle him to ride. Broyles *v.* Central of Georgia Ry. Co. (Ala.), 155.

TRAFFIC AGREEMENTS.

See NEGLIGENCE.

TRESPASSERS.

See CHILDREN; LICENSEES; MASTER AND SERVANT.

Contributory Negligence.

Trespasser, shot by railroad watchman, was not guilty of contributory negligence in failing to halt when called on so to do by the watchman. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

Degree of Care.

Due trespasser on train. Broyles *v.* Central of Georgia Ry. Co. (Ala.), 155.

Railroad is liable to trespasser on its ground only for willful or wanton injury. Conchin *v.* El Paso, etc., R. Co. (Ariz.), 192.

Though the owner of premises is not bound to a guard or protect a trespasser from dangers lurking thereon, he is liable for an injury to the trespasser if willfully inflicted. Riedel *v.* West Jersey & S. R. Co. (C. C. A.), 312.

Who Are.

Common-law doctrine that one who permits his cattle to stray upon another's land is liable as a trespasser is not recognized in Arkansas. St. Louis, etc., Ry. Co. *v.* Newman (Ark.), 331.

One finding the highway blocked an unreasonable time by a train of cars is not a trespasser upon the railroad property when passing prudently around the end of the train. Johnson *v.* Atlantic Coast Line R. Co. (Fla.), 263.

TRIAL.

In action for injury to passenger by alleged negligence of motorman, defendant was not prejudiced by remarks of plaintiff's attorney that the motorman was a strike breaker, it having been promptly excluded by the court. Louisville Ry. Co. *v.* Mitchell (Ky.), 710.

In personal injury action against certain railroad remarks of plaintiff's counsel were prejudicial to defendant. Louisville & N. R. Co. *v.* Payne (Ky.), 606.

VARIANCE.

See NEGLIGENCE.

VICE PRINCIPALS.

See FELLOW SERVANTS.

WANTONNESS.

See NEGLIGENCE.

WILLFULNESS.

See NEGLIGENCE.

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